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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 63

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS, PETITIONERS,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED APRIL 21, 1944.

CERTIORARI GRANTED MAY 29, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 915

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS, PETITIONER,

vs.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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IN THE COURT OF CLAIMS

No. M-107

THE NORTHWESTERN BAND OR TRIBE OF SHOSHONE INDIANS and the Individual Members thereof, Petitioner,

vs.

UNITED STATES OF AMERICA, Defendant.

PETITION—Filed March 28, 1931

To the Honorable, the Chief Justice and Associate Justices of the Court of Claims:

Your Petitioner, the Northwestern Band or Tribe of Shoshone Indians and the individual members thereof, respectfully represents to the Court:

[fol. 2] I

That it is a well recognized large band or tribe of the Shoshone Indian nation or people, said Shoshone nation or tribe, as it has been called, being composed of three main tribes or bands, namely, the Eastern Shoshone band or tribe now occupying land in the State of Wyoming under treaty with the United States; the Western band or tribe of the Shoshone Indians occupying lands in the States of Nevada, Idaho, California and Oregon, and your petitioner, the Northwestern band or tribe of Shoshone Indians, long occupying land throughout the part of the State of Utah north of the Great Salt Lake and extending thence westerly to the northeastern section of the State of Nevada and thence easterly to the northwestern section of the State of Wyoming and thence northward between these two aforesaid east and west boundaries into the State of Idaho to and including the Valley of the Snake River in said State of Idaho and mountains adjacent thereto, said land having been held in common by original possession and by virtue of treaty recognition by the United States, which made treaties in the 60's with the Eastern, Western and Northwestern bands of Shoshone Indians recognizing the lands and habitat of the several bands or tribes of the Shoshone nation of Indians.

Petitioner also held in common with the Bruneau and Boise Shoshones and the Bannock, otherwise styled the

Pañaiti tribe and other Indians, a large area known as the Great Camas Prairie wherein grew a root famed among Indians as necessary to their existence and a certain valley near to and northwest of the Great Camas Prairie where [fol. 3] grew the sago root, said Camas Prairie area being a region wherein the several tribes might resort by common custom and agreement with perfect safety and freedom while there from attack for feasting and gathering of vegetable life recognized as essential to their health.

II

Your petitioner brings this suit by virtue of an act of Congress, approved February 28, 1929 (45 Stat. 1407), entitled "An Act conferring jurisdiction upon the Court of Claims to hear, adjudicate, and render judgment in claims which the Northwestern Bands of Shoshone Indians may have against the United States," which act reads as follows:

> BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That jurisdiction be, and hereby is, conferred upon the Court of Claims, notwithstanding lapse of time or statutes of limitations, to hear, adjudicate, and render judgment in any and all claims which the northwestern bands of Shoshone Indians may have against the United States arising under or growing out of the treaty of July 2, 1863 (Eighteenth Statutes, page 685-2 Kappler, 848); treaty of July 30, 1863 (Thirteenth Statutes, page 863-2 Kappler, 850); Act of Congress approved December 15, 1874 (Eighteenth Statutes, page 291), and any subsequent treaty Act of Congress, or Executive order, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.
>
> [fol. 4] SEC. 2. That any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of the approval of this Act; and such suit shall make the northwestern bands of Shoshone Indians party plaintiff and the United States party defendant. The petition shall be verified by the

attorney or attorneys employed to prosecute such claims under contract with the northwestern bands of Shoshone Indians, approved by the Commissioner of Indian Affairs and the Secretary of the Interior as provided by law. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys for said Indians to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said Indians.

SEC. 3. That in said suit the Court of Claims shall also hear, examine, consider, and adjudicate all claims which the United States may have against the said northwestern bands of Shoshone Indians. Any payment which may have been made by the United States, including gratuities for the benefit of any band or bands of said Indians or for their support and civilization, shall not operate as an estoppel, but may be pleaded as a set-off in said suit.

SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act an appeal may be taken by either party, as in other cases, to the Supreme Court of the United States.

SEC. 5. The Court of Claims shall have full authority by proper process and orders to bring in and make [fol. 5] parties to such suit any and all persons deemed by it necessary or proper to the final determination of the matters in controversy.

SEC. 6. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he or some attorney from the Department of Justice to be designated by him is hereby directed to appear and defend the interests of the United States in such case.

SEC. 7. Upon final determination of such suit or suits the Court of Claims shall have jurisdiction to fix and determine a reasonable fee, not to exceed 10 per centum of the recovery, together with all necessary and proper expenses incurred in preparation and prosecution of the suit, to be paid to the attorney or attorneys employed

by said northwestern bands of Shoshone Indians, or any of them, and the same shall be included in the decree and shall be paid out of any sum or sums found to be due said bands.

SEC. 8. The balance of the proceeds of all amounts, if any, recovered for said northwestern bands of Shoshone Indians shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled thereto, and shall draw interest at the rate of 4 per centum per annum from the date of the judgment or decree and shall be subject to appropriation by Congress only for the health, education, and industrial advancement of said Indians.

III

This petition is filed in behalf of said Northwestern Band or Tribe of the Shoshone Nation or Tribe of Indians by their attorneys under a contract of employment between said Northwestern Band and Charles H. Merillat and [fol. 6] Charles J. Kappler dated March 19, 1926, duly approved by the Commissioner of Indian Affairs and the Secretary of the Interior on June 19, 1926.

IV

The Shoshone Nation or Tribe of Indians from time immemorial and prior to the time the first white explorers visited the Rocky Mountain region, and until and after the making of the treaties of 1863 hereinafter mentioned, with the assent, recognition and acknowledgment of all other Indians having any knowledge of them and their country and of all white nations claiming same as part of their general national domain had as their habitat and range and in their exclusive use and occupancy and claimed and used as their own for their ranging, hunting and grazing grounds and for their fields and the gathering of the products of the soil and of fuel a vast region extending as far east as parts of the Wind River and Uintah Mountains and extending thence westward through the Great Salt Lake on the south and into the State of Nevada as far as the State of California and following on the north the Snake River, its valleys and adjacent mountains westward into the States of Oregon and California. The region was visited only at rare intervals by the white man, these few

persons being either explorers or hunters and never in large numbers or making permanent settlements therein until after the discovery of gold in California in the late forties and in Idaho and Oregon in the early sixties, save and except that the Mormons in the fifties occupied a small area around Great Salt Lake as a home and refuge safe [fol. 7] from molestation by the United States. Aside from this Mormon colony even at late as 1860 the only white persons were explorers and hunters and persons traversing a few roads through the country en route to the Pacific Coast. The country had a good supply of game on which chiefly the Shoshone Nation of Indians depended for their existence and which game they followed as it roamed through the vast territory described.

V

The Shoshone Nation or Tribe during this period had three well defined, well recognized divisions thereof. When they assembled as they occasionally did for purposes of mutual offense or defense against other tribes of Indians, determination of matters of Indian policy or of hunt of the buffalo which constituted so large a part of their means of livelihood, being food, raiment and shelter to them, or for purposes of social enjoyment, ceremonies, religion, marriage or feasting, the headship or chieftainship over the whole Shoshone Nation by consent was accorded to the principal chief of the Eastern band or tribe of Shoshones by virtue of the fact it was the largest in numbers and the principal home of the buffalo was there. These three grand divisions were the Eastern tribe or band or buffalo eaters, its area extending westward to what is known as the Bear River and Port Neuf Mountain region, the Northwestern tribe or band whose area extended from the aforesaid Bear River and Port Neuf Mountain country along the Snake River in the north and to the country of the Great Salt Lake on the south and westward to the mountains near the boundary between Utah and Nevada wherein lie the head- [fol. 8] waters of the Raft River and Goose Creek, which flow into the Snake River, this band subsisting partly on buffalo to be found, but in smaller numbers within this area, than in the land of the Eastern Shoshones, but also largely relying on deer, smaller forms of animals, nuts and produce of the soil; and the western band of Shoshones

who were less closely knit into a communal life and were desert dwellers in the south and largely relied on produce of the soil, fish and what game could be found eked out by hunting by courtesy with their brethren of the same language living eastward—the area of country of the Western Shoshones embracing the south part of the Great Salt Lake Desert, part of Nevada and along the Snake River west of where lies the confluence in Idaho of the Raft River and Goose Creek with the Snake River.

Each of these main three tribes or bands in turn had several or more smaller subdivisions, recognizing a principal chieftain but with heads or chiefs over the several smaller subdivisions. So little was known by the United States in this period of the Indian tribes of Western Colorado, Western Wyoming, Utah and Idaho as late as the early fifties that a supposedly comprehensive "statement showing the tribes of Indians within the limits of the United States" (Annual Report of Commissioner of Indian Affairs for 1855-56, pages 575-6) does not even mention the Shoshone or Utah Indian nations or tribes though each tribe comprised many thousands of persons, the Utah tribe occupying and claiming only territory south of that described herein as Shoshone country and each in numbers exceeding five thousand souls.

[fol. 9] VI

After the discovery of gold in 1848 in the mountains of California near Sacramento, there came in the fifties travel by wagon through to the Pacific Coast, first by way of Great Salt Lake and in the late fifties one such road to northern California and one to southern Oregon, which said roads passed through the lands of petitioners, crossing each other there after passing through the country of the Eastern band of Shoshones and proceeding thence through the country along the Snake River of the Western Shoshones. These roads lying through the lowlands drove away the game and steadily reduced the means of livelihood of the Shoshones and further south of the Utah tribe and of the Goships or small bands of Indians who lived a precarious existence in the southern part of the Great Salt Lake desert, causing great dissatisfaction among the Indians, aggravated frequently by the conduct of the wilder and more reckless element among the travelers. When gold

was discovered in the early sixties in the Beaver Head, Salmon River and Boise areas in Idaho, the rush of settlers along the Snake River through the domain of petitioners and of the other members of the Shoshone tribe attracted large numbers of reckless and dissolute whites to the highways, who formed gangs of robbers which in the canyons preyed upon travelers and the Indians alike, until the name of Idaho became a reproach to decent people. These dissolute characters frequently threw the blame of their misdeeds on the Indians and in furtherance of their plans with whiskey and by other means induced some Indians to join them and by propaganda and other methods in- [fol. 10] flamed members of the Shoshone Tribe already dissatisfied and suffering as with destruction of the game and driving thereof into mountain recesses they faced, and in some instances suffered, starvation. The result was murder, robbery and violence, augmented by the machinations of the Sioux, Cheyenne and other easterly Indian tribes who sought to embroil all Indians with the whites as their only escape from annihilation. The United States determined to make the high roads safe and as preliminary to peace treaties so providing with the Shoshones, Utah and other tribes, sent forth military expeditions to find and lick the Indians who were poorly equipped to fight well armed soldiers. The greater portion of petitioners were friendly to the whites, but unable to restrain the wilder and more desperate of their people, some of whom, usually incited by white desperadoes, attacked emigrant trains.

VII

In 1862 expeditions equipped by the United States pursuant to its major policy of safety for its citizens traversing the Indian country, fought and licked the Goship and the Utahs. In January, 1863, some hundreds of members of the Northwestern band of Shoshones were foregathered at one of their customary wintering places at Bear Lake and along Bear River in southeastern Idaho under their principal chiefs, Pokatello and Sanpitz, both held in esteem for their prowess as hunters and warriors and the more peaceable chief Toomontso, known to the whites as Black Beard, with one or two smaller bands from the Eastern Shoshone Tribe acknowledging Washakee as their head chief. Their purpose was hunting for food in the snows

[fol. 11] among the mountains to which the larger game had been driven by the aforesaid large travel on the highways. They were surprised and attacked in their camps by General Connor with 250 men who had fought the California Indians and had as a precept that the only good Indians were dead Indians. A severe battle ensued in which 224 Indians, men, women and children, were killed with a loss to the soldiers of 14 killed and 49 wounded. This was the last time the petitioners ever fought against the white men and thereafter they were cowed and afraid to assert their rights even when their land and water rights were taken from them and they were forced, as they subsequently were forced, to become wanderers, without homes in the land theirs by immemorial right and treaty acknowledgment, made in 1863 with them by the United States. Toomontso or Black Beard as the more peaceable of petitioners' tribe or band was declared principal chief thereof by the army.

VIII

Following its military subjugation of the Indians and pursuant to its aforesaid policy to make safe the routes of travel for its emigrants and others who wished to proceed to the mining fields of California, Nevada, Utah, Idaho and parts of Oregon, and its policy to define the boundaries of Indian tribes to the end that the peace of the United States and its citizens might not be endangered by disputes between the several Indian tribes or bands, as to the territory to which said tribes or bands were entitled, the United States in the year 1863 made a series of treaties with the Shoshone tribe of Indians and the several bands thereof. [fol. 12] The first of said treaties was that made with the Eastern band of Shoshones, constituting the largest of the bands which in the aggregate made up the Shoshone tribe or nation of Indians.

Said treaty with the Eastern Shoshone tribe or band was made on July 2, 1863, and proclaimed after due ratification on June 7, 1869 (18 Stats. 685; 2 Kappler Indian Treaties, p. 848), and reads as follows:

> "Articles of Agreement made at Fort Bridger, in Utah Territory, this second day of July, A. D. one thousand eight hundred and sixty-three, by and between the United States of America, represented by its

Commissioners, and the Shoshone nation of Indians, represented by its Chiefs and Principal Men and Warriors of the Eastern Bands, as follows:

Article 1

Friendly and amicable relations are hereby reestablished between the bands of the Shoshone nation, parties hereto, and the United States; and it is declared that a firm and perpetual peace shall be henceforth maintained between the Shoshone nation and the United States.

Article 2

The several routes of travel through the Shoshone country, now or hereafter used by white men, shall be and remain forever free and safe for the use of the government of the United States, and of all emigrants and travellers under its authority and Protection, without molestation or injury from any of the people of the said nation. And if depredations should at any time be committed by bad men of their nation, the offenders shall be immediately seized and delivered up to the [fol. 13] proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over said routes is hereby guaranteed by said nation. Military agricultural settlements and military posts may be established by the President of the United States along said routes; ferries may be maintained over the rivers wherever they may be required; and houses erected and settlements formed at such points as may be necessary for the comfort and convenience of travellers.

Article 3

The telegraph and overland stage lines having been established and operated through a part of the Shoshone country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said nation; and that their property, and the lives of passengers in the stages, and of the employes of the respective companies, shall be protected by them.

And further, it being understood that provision has been made by the Government of the United States for

the construction of a railway from the plains west to the Pacific ocean, it is stipulated by said nation that said railway, or its branches, may be located, constructed, and operated, without molestation from them, through any portion of the country claimed by them.

Article 4

It is understood the boundaries of the Shoshone country, as defined and described by said nation, is as follows: On the north, by the mountains on the north [fol. 14] side of the valley of Shoshone or Snake River; on the east, by the Wind River mountains, Peenahpah river, the north fork of Platte or Koo-chin-agah, and the north Park or Buffalo House; and on the south, by Yampah river and the Uintah mountains. The western boundary is left undefined, there being no Shoshones from that district of country present; but the bands now present claim that their own country is bounded on the west by Salt Lake.

Article 5

The United States being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by whites, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, the United States promise and agree to pay to the bands of the Shoshone nation, parties hereto, annually for the term of twenty years, the sum of ten thousand dollars, in such articles as the President of the United States may deem suitable to their wants and condition, either as hunters or herdsmen. And the said bands of the Shoshone nation hereby acknowledge the reception of the said stipulated annuities, as a full compensation and equivalent for the loss of game, and the rights and privileges hereby conceded.

Article 6

The said bands hereby acknowledge that they have received from said Commissioners provisions and clothing amounting to six thousand dollars, as presents, at the conclusion of this treaty.

[fol. 15] Article 7

Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said Treaty with said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the Laws thereof.

Done at Fort Bridger the day and year above written. James Duane Doty, Luther Mann, Jr., Commissioners. Washakee, his x mark. Wahapitz, his x mark. Toopsapowet, his x mark. Pantoshiga, his x mark. Ninabitzee, his x mark. Narkawk, his x mark. Taboonshea, his x mark. Weerango, his x mark. Tootsahp, his x mark. Weeahyukee, his x mark. Bazile, his x mark.

In the presence of—
Jack Robertson, interpreter. Samuel Dean."

Thereafter, by treaty made July 30, 1863, and after due ratification by the Senate, proclaimed January 17, 1865, the United States made a treaty with your petitioner, the Northwestern bands of the Shoshone tribe (13 Stats. 663; 2 Kappler 850), said treaty reading as follows:

[fol. 16] "Articles of agreement made at Box Elder, in Utah Territory, this thirtieth day of July, A. D. one thousand eight hundred and sixty-three, by and between the United States of America, represented by Brigadier-General P. Edward Connor, commanding the military district of Utah, and James Duane Doty, commissioner, and the northwestern bands of the Shoshonee Indians, represented by their chiefs and warriors:

Article 1. It is agreed that friendly and amicable relations shall be re-established between the bands of the Shoshone Nation, parties hereto, and the United States, and it is declared that a firm and perpetual peace shall be henceforth maintained between the said bands and the United States.

Article 2. The treaty concluded at Fort Bridger on the 2nd day of July, 1863, between the United State and the Shoshonee Nation, being read and fully interpreted

and explained to the said chiefs and warriors, they do hereby give their full and free assent to all of the provisions of said treaty, and the same are hereby adopted as a part of this agreement, and the same shall be binding upon the parties hereto.

Article 3. In consideration of the stipulations in the preceding articles, the United States agree to increase the annuity to the Shoshonee Nation five thousand dollars, to be paid in the manner provided in said treaty. And the said northwestern bands hereby acknowledge to have received of the United States, at the signing of these articles, provisions and goods to the amount of two thousand dollars, to relieve their immediate necessities, the said bands having been reduced by the war to a state of utter destitution.

[fol. 17] Article 4. The country claimed by Pokatello, for himself and his people, is bounded on the west by Raft River and on the east by the Porteneuf Mountains.

Article 5. Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.

Done at Box Elder, this thirtieth day of July, A. D. 1863.

James Duane Doty, Governor and acting superintendent of Indian affairs in Utah Territory. P. Edw. Connor, Bridgadier-General U. S. Volunteers, commanding District of Utah. Pokatello, his x mark, chief. Toomontso, his x mark, chief. Sanpitz, his x mark, chief. Tosowitz, his x mark, chief. Yahnoway, his x mark, chief. Weerahsoop, his x mark, chief. Pahragoosahd, his x mark, chief. Tahkwetoonah, his x mark, chief. Omashee, (John Pokatello's brother,) his x mark, chief.

Witnesses:

Robt. Pollock, colonel Third Infantry, C. V. M. G. Lewis, captain Third Infantry, C. V. S. E. Joselyn, first lieutenant Third Infantry

C. V. Jos. A. Gebone, Indian interpreter. John [fol. 18] Barnard, Jr., his x mark, special interpreter. Willis H. Boothe, special interpreter. Horace Wheat."

The aforesaid Article 5 was not contained in the treaty as originally made between the United States and petitioners, but said Article 5 was added to said treaty aforesaid by the Senate of the United States when it ratified said treaty and thereafter said amendment was ratified and agreed to by petitioners at the instance and request of the United States, although said petitioner did not have any knowledge as to Mexico, or the purpose or intent intended to be conveyed by said Article 5, but accepted the same and agreed to the treaty as amended solely upon representations of the United States that said amendment was desired by the Government of the United States.

Thereafter, in order to complete its agreements with what were the true Shoshone bands constituting the whole Shoshone tribe proper, the United States, on October 1, 1863, made a treaty with the western bands of Shoshone Indians which after due ratification was proclaimed October 21, 1869 (18 Stats. 689; 2 Kappler 851). Said treaty with the western band read as follows:

"Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this first day of October, A. D., one thousand eight hundred and sixty-three, between the United States of America, represented by the undersigned commissioners, and the Western Bands of the Shoshone Nation of Indians, represented by their Chiefs and Principal Men and Warriors, as follows:

[fol. 19] Article 1. Peace and friendship shall be hereafter established and maintained between the Western Bands of the Shoshone nation and the people and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States within their country, shall cease.

Article 2. The several routes of travel through the Shoshone country, now or hereafter used by white men, shall be forever free, and unobstructed by the said

bands, for the use of the government of the United States, and of all emigrants and travellers under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their nation, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offenses shall deserve; and the safety of all travellers passing peaceably over either of said routes is hereby guaranteed by said bands.

Military posts may be established by the President of the United States along said routes or elsewhere in their country; and station houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travellers or for mail or telegraph companies.

Article 3. The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of the Shoshone country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said bands, [fol. 20] and that their property and the lives and property of passengers in the stages and of the employes of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by the said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of country claimed or occupied by them.

Article 4. It is further agreed by the parties hereto, that the Shoshone country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required. Mills may be erected and timber taken for their use, as also for building and other purposes in any part of the country claimed by said bands.

Article 5. It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows: On the north by Wong-goga-da Mountains and Shoshone River Valley; on the west by Su-non-to-yah Mountains or Smith Creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

Article 6. The said band agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country [fol. 21] above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

Article 7. The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, and of their faithful observance by the said bands, the United States promise and agree to pay to the said bands of the Shoshone nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

Article 8. The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to five thousand dollars as presents at the conclusion of this treaty.

Done at Ruby Valley the day and year above written.

James W. Nye. James Duane Doty. Po-on-go-

sah, his x mark. Par-a-woat-ze, his x mark. Ga-ha-dier, his x mark. Ko-ro-kout-ze, his x [fol. 22] mark. Pon-ge-mah, his x mark. Buck, his x mark. Te-moak, his x mark. Mo-ho-a. Kirk-weedgwa, his x mark. To-nag, his x mark. To-so-wee-so-op, his x mark. Sow-er-e-gah, his x mark.

Witnesses:

J. B. Moore, Lieutenant-colonel, Third Infantry, California Volunteers; Jacob T. Lockhart, Indian agent Nevada Territory; Henry Butterfield, Interpreter."

Thereafter, the United States made a treaty with what is known as the Shoshone-Goship bands of Indians at Tuilla Valley in the territory of Utah on October 12, 1863. Said Shoshone-Goship tribe does not and did not constitute a part of the Shoshone tribe proper, but Indians who frequently were by reason of use of some words of the Shoshone language confounded with the Shoshone tribe. Said treaty defined the boundaries of the Goship tribe by Article 5, as follows:

"It is understood that the boundaries of the country claimed and occupied by the Goship tribe, as defined and described by said bands, are as follows: On the north by the middle of the Great Desert; on the west by Steptoe Valley; on the south by Tooédoe or Green Mountains; and on the east by Great Salt Lake, Tuilla, and Rush Valleys."

The land north of the Goships as above described was in Box Elder County, Utah and was part of the country be- [fol. 23] longing to petitioners, whose route of travel from the upper reaches of the Great Salt Lake ran thence to the mountains near what is now known as Montello in northeastern Nevada where the mountain range and Silver Creek run to the headwaters of the Raft river and Goose Creek in the Goose Creek Mountains in the northeastern corner of Nevada and which empty into the Snake river.

IX

Petitioners state that in and by the treaties aforesaid the United States recognized as belonging to petitioners and of

which lands petitioners at the time of the making of said treaty was in actual exclusive use and occupancy with its rights thereto unquestioned by any other Indian tribe or by any other nation, whether that of Mexico, the United States, Great Britain or Spain an area of country defined and bounded as follows: By the eastern shore of the Great Salt Lake at the mouth of Weber river, thence east with said river to the mouth of Lost Creek, thence to the headwaters of Lost Creek and the divide between Lost Creek and Woodruff Creek, thence from the headwaters of Woodruff Creek to Bear river in Northeastern Utah and following the shores of Bear river and its tributaries in a northerly direction east of Bear Lake and into the western edge of Wyoming, thence with what is now known as the Caribou range of mountains in eastern Idaho to the south fork of the Snake river and the valley of the Snake river in eastern Idaho, thence westerly with said Snake river and valley to the mouths of Raft river and Goose Creek in the Snake river, thence south following the Raft River and Goose Creek to [fol. 24] their headwaters in the Goose Creek Mountains in the northwestern corner of Utah and the northeastern corner of Nevada and thence following said Goose Creek Mountains and Silver Creek in the far eastern part of Nevada to near the present town of Montello, Nevada, and thence across the upper half of the Great Salt Lake Desert to the western shores of Great Salt Lake and following said shore to the place of beginning.

Petitioner states that it was in the exclusive possession, use and occupancy of this described area at the time of the making of the treaty of Box Elder of July 30, 1863, and the ratification thereafter of the Senate amendment to same and continued thereafter so to possess, use and occupy same until unlawfully dispossessed thereof by the United States and its citizens who in violation of the aforesaid treaty entered upon from time to time the land and its water courses, entering upon and treating said lands as public lands of the United States open to public entry, creating forest and game preserves of many hundreds of thousands of acres thereof and settling other Indians upon said lands without warrant therefor in the treaty between the United States and petitioners and dispossessing petitioners therefrom, sometimes by force and threats. Petitioners state that by this means they were deprived without compensation of the use

of said lands and were forced to become wanderers thereover, each year witnessing their further exclusion from use of their own lands and their deprivation of means of livelihood until large numbers of them became able to subsist only meagrely and with the aid of those friendly persons who pitied their condition.

[fol. 25] Petitioners state that they never at any time, however, from the date of the treaty, ever took up arms against the United States or its citizens but resigned themselves to futile protests against the wrongs done them.

X

Petitioners state that while they were in the exclusive possession, use and occupation of said lands described and all other Indian tribes recognized and acknowledged same except for a dispute of the Eastern Band or Tribe with the Crow Tribe of Indians as to the eastern boundary thereof in the Wind River Mountains wholly outside and beyond the territory of petitioners, and all other Indian Tribes and even the Crow Tribe acknowledged that the domain of the Shoshone Tribe ran to the Snake River and the Valley thereof on both sides of the river, that said Shoshone Tribe did not object to occasional use for hunting purposes of parts of their lands by other friendly Indians in small parties and indeed invited them to go on hunts with them. Among said tribes or bands was the Bannock Tribe otherwise known as the Panaiti. The Bannocks are a tribe of Indians whose habitat and range was well to the north and west of the Shoshone Indian country, beyond the mountains north of the Snake River Valley near to the territory of the Blackfeet Nation or Tribe in Montana and the Nez Perce and other tribes in Oregon and Washington State. As warfare developed between the Bannocks and its aforesaid neighbors and the pressure of the United States became greater on all Indian Tribes of the Rocky Mountain region due to settlements of its citizens, opening of highways and mineral development and the dispersal of the [fol. 26] game, the Bannock Tribe was forced down to the Southeast and to a large extent became in the sixties without recognized lands of their own. They spoke a wholly different tongue, but were friendly with the Shoshones and had aided them in warfare against Indian enemies and had hunted at times by permission with them and to some extent

in later years had intermarried among the Shoshones. The Bannocks brought their distress to the attention of the United States.

XI

Subsequently thereto, the United States, by treaty dated July 3, 1868 proclaimed after due ratification February 24, 1869 (15 Stats. 673: 2 Kappler 1020) made a treaty with Eastern band of Shoshones aforesaid and the Bannock Tribe of Indians, which said treaty by Articles 2, 4 and 5, provides as follows:

"Article 2. It is agreed that whenever the Bannacks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the 'Port Neuf' and 'Kansas Prairie' countries, and that, when this reservation is declared, the United States will secure to the Bannacks the same rights and privileges therein, and make the same and like expenditures therein for their benefit, except the agency-house and residence of agent, in proportion to their numbers, as herein provided for the Shoshone reservation. The United States further agrees that the following district of country, to-wit: Commencing at the mouth of Owl Creek and running due south to the [fol. 27] crest of the divide between the Sweetwater and Popo Agie Rivers; thence along the crest of said divide and the summit of Wind River Mountains to the longitude of North Fork of Wind River; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight-line to head-waters of Owl Creek and along middle of channel of Owl Creek to place of beginning, shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshone Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized to do so, and except such officers, agents, and employes of the Government as may be authorized

to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid."

Petitioners state that save as to the Camas Prairie styled in the aforesaid treaty the "Kansas Prairie" and the Sago root valley to the northwest which by custom were used in common by all Indians of the region and by reason of necessity of use of the roots to ensure freedom from the ills of too great a meat diet were a sort of Indian sanctuary like the [fol. 28] salt region of Oklahoma and the celebrated pipestone quarries that the Bannack Tribe had and were lawfully entitled to no lands whatsoever within the described domain of petitioners south of the Snake River and Snake River Valley and that the Eastern Band of Shoshones had no claim, and so recognized and acknowledged to the lands of petitioners.

Petitioners state that for some reason to them unknown but known to the United States and disclosure whereof by processes of this court petitioners pray, the United States did not locate the Bannack Tribe as friendly Indians upon the lands set apart for the Eastern Tribe or Band of Shoshones upon what is known as the Owl Creek or Wind River Reservation as it contemplated at the time, but instead settled the unfriendly Arapahoe Indians on same and proceeded without consent of petitioners to settle the Bannack Tribe upon lands in the northeastern part of petitioners herein described domain and also certain Indians known as the Sheep Eaters and created for the Bannacks a reservation out of the lands of petitioners known as the Fort Hall Indian Reservation in Idaho, admitting to said reservation from time to time some individual members of the Northwestern Band of the Shoshone Tribe, most of whom were forced by poverty to accept entrance thereto, others and the greater number of the Northwestern Band of Shoshones being even denied rights therein though the same was their own domain.

XII

Petitioners state that by certain treaties between the governments of the United States and Mexico there was ceded by Mexico to the United States subject to certain reserva- [fol. 29] tions mutually agreed upon between them for protection of the peoples including Indians within the lands ceded, large, and in part at the time, by reason of the very meagre knowledge of much of same, ill defined vast sections of country formerly claimed by Mexico and now forming part of the United States. This cession included lands to the source or headwaters of the Colorado River then unknown to either government. By convention between the governments of the United States, Mexico and Great Britain, which last named government claimed sovereign rights to part of the region occupied by petitioners, it was agreed without consultation with the Indians, that the cession of Mexico to the United States extended along the 42nd degree of latitude from Wyoming to the Californias. This latitude approximates the present boundary between the States of Utah and Idaho. By its terms part of the domain of petitioners fell within the terms of the cession of Mexico to the United States and a larger part fell without said Mexican cession. This fact was wholly unknown to the United States or petitioners when the United States Senate amended and petitioners agreed to the last article added in the Senate to the aforesaid Box Elder treaty of 1863 between the United States and petitioners and in no event could apply to Indian rights outside said cession.

Petitioners state, however, that while Mexico did not accord to Indians the same rights of possession of their lands while they continued to use and occupy same, as did the United States, Great Britain, France and Spain, and refused to acknowledge the Indians right not to deprived of their lands without just compensation and refused to acknowledge the right of Indian tribes to make or the [fol. 30] validity of treaties or agreements if made with them, concerning Indian lands and asserted the absolute right of Mexico at will to remove Indians and Indian tribes from their homes that this absolute power always was conditioned that the government should accompany such removal by provision of other homes and areas of country for the Indians so removed.

By treaty of February 2, 1848 (9 Stats. 22), and prior treaty between the United States and Mexico, it was provided inter alia that the United States "when removing Indians for settlement by citizens shall take special care not to place its Indian occupants under the necessity of seeking new homes by committing those invasions which the United States have solemnly obligated themselves to restrain."

Petitioners state that the United States did not, as stated, provide new homes for petitioners and did not comply as to petitioners with its own policy as to Indian tribes and extinguishment of their occupancy title and their title by treaty or agreement with the United States or upon just compensation therefor as required by the Constitution of the United States.

XIII

The area of country belonging to petitioners at the time of the making of the Box Elder treaty of 1863 includes the following counties in Utah:

Weber, part of Morgan, Rich, Cache and Box Elder.

And the following counties in Idaho: Bear Lake, Caribou, most of Bonneville, part of Bingham, Bannack, part of Power, Franklin, Oneida, a small part of Minidoka, and the larger part of Cassia. Some of said Idaho counties have [fol. 31] been redistricted and new counties created.

Within said area are the following national forest reservations created by the United States and taken from petitioners without compensation: Cache National Forest, Minidoka National Forest, Caribou National Forest, Fort Hall Indian Reservation, Power County State Game Preserve and the Oneida County State Game Preserve. It includes the valleys of the Snake River and tributaries, Bear River and its tributaries, Logan River, Malad River, Raft River, Goose Creek, Weber River, Blue Creek and other streams besides many mountains and within which area and throughout same petitioners established many camps, had their homes and made their living with exclusive use and occupancy thereof.

Its extent in acres is to petitioner unknown but estimated, including the lands in Wyoming and Nevada, at about fourteen million acres. Petitioner states that the exact extent

in acres is known to the United States and petitioner prays an accounting therefor from the United States, including therein the value of the use of the Camas Prairie and Sago Root Country of which petitioner was deprived by the United States and its citizens at the rate of $1.25 per acre, the lowest price at which by statute, in such case made and provided, public lands of the United States have been permitted to be sold for a hundred years last past less the average cost of sale of public lands of the United States of not exceeding twenty cents per acre, petitioners stating that the United States is indebted to petitioners on account of lands of which they were unlawfully deprived by the United [fol. 32] States without compensation as aforesaid as estimated by petitioners in the sum of fifteen million dollars.

XIV

Petitioners state that in and by the treaty of Box Elder of 1863 presents were distributed to petitioner at the time of the signing of said treaty and a distribution made, presumably of annuities, at the time of the ratification of the Senate Amendment to said treaty. From the best information petitioner can obtain after a careful painstaking inquiry of its older members and of old settlers, there was only one other distribution made them. Petitioners are advised that the statutes of the United States show annual appropriations of $5,000 for twenty years by Congress in fulfillment of the Box Elder treaty of 1863 but petitioners state that except as aforesaid the payments of said monies so appropriated were not made to petitioners and petitioners pray that the United States be required to account for all monies or distribution of goods alleged to have been distributed to petitioners with the dates of payments or distributions, to whom claimed to have been made and what rolls of members of the Northwestern Band of Shoshones or other Indians were used as a basis of payments or distributions, petitioners claiming on account hereof the sum of seventy thousand ($70,000.00) dollars with interest.

XV

Petitioners state that they have endeavored to ascertain the numbers of the Eastern, Northwestern and Western bands or tribes of the Shoshone Nation or Tribe of Indians

[fol. 33] in the year 1863 but by reason of the vast extent of country over which they roamed and the slight knowledge of them possessed by the United States or its citizens at the period in question, petitioners are unable to give more than a general approximate estimate of same Petitioners from their best information estimate same at a total of around six thousand to sixty-five hundred, divided as follows: the Eastern band, three thousand or a little more; the Northwestern band, two thousand, and the Western bands, one thousand or somewhat in excess of that number.

XVI

Wherefore, and by reason of the premises aforesaid the Northwestern band or tribe of the Shoshone Nation of Indians and the individual members thereof sue the United States of America for damages for the taking of its lands without compensation therefor and for an accounting, and pray that this Court may render judgment in favor of petitioners against the defendant in the sum of $15,070,000.00 or in such sums as upon full and final hearing and accounting shall be found due the Petitioners by the United States; and for such other and further relief as Petitioners may be entitled to both at law and in equity, and that the Court decree the fees and expenses to be paid attorneys representing Petitioners as provided in the jurisdictional act and in the contract executed in pursuance thereof.

The Northwestern Band or Tribe of Shoshone Indians, Petitioners, by Charles H. Merillat, Attorney of Record.

[fol. 34] *Duly sworn to by Charles H. Merillat. Jurat omitted in printing.*

[fols. 35-36] General Traverse—Filed May 7, 1931

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Charles B. Rugg, Assistant Attorney General.

G. T. S.

Argument and Submission of Case

On March 4, 1941, the case was argued and submitted on merits by Mr. Ernest L. Wilkinson and Mr. Herman J. Galloway for plaintiff, and by Mr. George T. Stormont for defendant.

[fols. 37-88] **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Littleton, J.— Filed March 2, 1942**

Mr. Ernest L. Wilkinson and *Mr. Herman J. Galloway* for the plaintiffs.

Mr. Charles J. Kappler, *Mr. Frank K. Nebeker*, and *Mr. Clinton D. Vernon* were on the brief.

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Norman N. Littell*, for the defendant.

Mr. Raymond T. Nagle was on the brief.

In the petition plaintiff bands of the Shoshone tribe seek to recover $15,000,000 for the alleged unlawful taking of their lands, aggregating 15,643,000 acres, in alleged violation of a treaty of July 30, 1863, and $70,000 of the treaty annuities of $5,000 per annum for twenty years which it is alleged the Government failed to furnish in goods and provisions as agreed.

Defendant contends that the treaty of July 30, 1863, with plaintiff bands was a treaty of peace and amity and that it did not recognize, acknowledge, or concede as against the sovereign an exclusive use and occupancy right or title of the Indians; that the United States did not at that time recognize or has it ever recognized an exclusive right of occupancy in plaintiff bands to the whole or any part of the territory now claimed by them, but that it has ever exercised dominion and complete ownership over it.

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Defendant further contends with reference to the annuity provisions of the treaty that if there was any deficiency in the furnishing of the annuity goods provided therein, such deficiency did not exceed $10,804.17.

SPECIAL FINDINGS OF FACT

1. Plaintiff bands of Shoshone Indians were in 1863 and prior thereto a part of about fourteen bands of the Shoshone nation or tribe of Indians located in the territories of Washington and Utah. The area inhabited and occupied by the Shoshone nation or tribe of Indians became a part of the states of Wyoming, Colorado, Utah, Idaho, and Nevada. For convenience the officials and agents of the United States having charge of Indian affairs designated and referred to the plaintiff Indians of the Shoshone tribe as the "Northwestern" bands of the Shoshone Indians in their correspondence, reports, and treaties. The Shoshone nation, or tribe, itself had no such recognized division. The Shoshone tribe of Indians with its affiliated bands of Bannock Indians and a number of individual Indians of other friendly tribes, who had extensively intermarried among the Shoshones and lived with them, roamed over, occupied, and used as their home a vast area approximating 80,825,000 acres. During and prior to 1863 the Shoshone Tribe of Indians and the affiliated bands of Bannocks, from time immemorial, roamed over, lived upon, occupied, and used a territory of the approximate area above mentioned as their home and for their support and livelihood, by hunting and gathering roots, berries and nuts. This approximate area was exclusively claimed by the Shoshone tribe and Bannock Indians as against other tribes, and their possession, occupancy, and use thereof was asserted by them to the exclusion of other tribes of Indians and was thus recognized generally by other separate Indian tribes. During and prior to 1863 the Indians of the Shoshone tribe and the affiliated bands of Bannocks numbered about 9,700. Washakie was the main or principal chief of the Shoshone nation or tribe and of the affiliated Bannocks, and the Shoshone and Bannock Indians and the chiefs of the various bands of these tribes so recognized him as the prin-

cipal chief of the tribe. As was the usual custom among Indian tribes, the Shoshone and Bannock Indians had various bands, each having a chief and various subchiefs or headmen.

2. The territory for which compensation is claimed by plaintiff bands of the Shoshone tribe as for a taking by the United States of their use and occupancy title, which interest they claim was recognized and acknowledged by the United States in a treaty of July 30, 1863, consists of 15,643,000 acres of land of which 6,067,000 acres are located in the southeastern part of Idaho, 6,389,000 acres in the northwestern corner of Utah, including Great Salt Lake, and 3,187,000 acres in the northeast corner of Nevada. The population of plaintiff bands in 1863 was between 1,500 and 1,800.

3. In 1850, and prior thereto, practically nothing was known by the Government with reference to the Indians inhabiting the region which became southern Idaho, eastern Oregon, northern Nevada and northern Utah, and little, if anything, was definitely known of the tribal distinctions or racial affiliations, and the Government had no knowledge of the particular or specific areas occupied by particular tribes or bands. The Indians of this region were denominated as Shoshones, Snakes, and Diggers, or Paiutes.

The Indians of the Shoshone and Bannock tribes have always shown an attitude and desire to be peaceful and friendly to the whites and to the Government. Washakie, principal chief of the Shoshone tribe, and the majority of all the Shoshone Indians of that tribe have been friendly at all times with the white people and with the Government of the United States. The Shoshone tribe, as such, has never at any time engaged in war with the United States. Between 1849 and 1863 some of the Shoshone Indians of the Northwestern Bands caused the emigrants, settlers, and the Government considerable trouble by depredations and warlike acts due to the driving away of game and the destruction of their only source of food supply. Following the advent of the Mormons into Utah, their spread into arable valleys in the southeastern corner of Idaho and the establishment of overland trails to California and Oregon and to the mining regions of Idaho and Montana through

the country inhabited by the Shoshone Indians, trouble between some of the Indians and the emigrants and settlers arose. This was due to the driving away by the emigrants and white settlers of the sparse game supply of the Indians and the destruction of the equally sparse supplies of grass and timber from which the Indians also obtained a considerable portion of their livelihood in the form of roots, berries, and nuts, thus causing the Shoshone Indians, especially those located in south central Idaho, northeastern Nevada, and northwestern Utah to be reduced to a condition of practical starvation, rendering it necessary for them to "steal or starve." The Commissioner of Indian Affairs in his annual report for the fiscal year ending June 30, 1859, stated in part as follows:

> The reports of the condition of the Indians in Utah present a melancholy picture. The whites are in possession of most of the little comparatively good country there is, and the game has become so scarce as no longer to afford the Indians an adequate subsistence. They are often reduced to the greatest straits, particularly in the winter, which is severe in that region; and when it is no uncommon thing for them to perish of cold and hunger. Even at other seasons, numbers of them are compelled to sustain life by using for food reptiles, insects, grass seed, and roots. Several farms have been opened for their benefit in different localities, and many of them have manifested a disposition to aid in their cultivation; but, unfortunately, most of the crops were this year destroyed by the grasshopper and other insects. Many of the numerous depredations upon the emigrants have, doubtless, been committed by them in consequence of their destitute and desperate condition. They have at times been compelled to either steal or starve; but there is reason to be apprehended that in their forays they have often been only the tools of the lawless whites residing in the Territory. In some of the worst outrages of this kind, involving the lives as well as the property of our emigrants, the latter are known to have participated. * * *.

The Superintendent of Indian Affairs for the Utah Territory in his annual report of October 1, 1861, to the Commissioner of Indian Affairs stated:

> Too little attention, I am fearful, has heretofore been paid to the fact that there is very little game in this

Territory, of any description, which the Indians can kill to keep them in food. There is no buffalo whatever that range in this Territory, and very few antelope, elk, deer, mountain sheep, or bear, and these only in certain localities.

Civilization seems to have had the same effect here as has been noticed elsewhere in this country since the first settlement by our forefathers, in driving before it the game natural to a wilderness, and the Indians complain bitterly that since the white man has come among them their game has almost entirely disappeared from their former hunting grounds, and they are now obliged either to beg food from the white settlers or starve.

The driving away of the buffalo not only deprives them of their principal supply of food, but also of a great source of revenue and comfort in the skins, which they sold and used to keep them comfortable in cold weather.

I have had more applications from Indians for beef and flour since I have been here than anything else. They frequently come to me and fairly beg for some beef, to keep their squaws and papooses from starving.

Owing to the limited amount of money placed in my hands, I have been unable to entirely satisfy their demands, but I am confident that what I have distributed in that way has been a great deal more satisfactory to the Indians than three times the amount expended in any kind of trinkets usually disbursed by the department would have been.

The annual appropriation for this superintendency has, in my opinion, always been too small to allow the superintendent and agents to give that satisfaction to the Indians which their wants demand, and a proper regard for the rights and safety of the white settlers, by preventing depredations, requires.

* * * * *

The establishment of the overland daily mail and telegraph lines, and their recent completion through this Territory—consummations of such vital importance to the people throughout the Union—renders it necessary that steps should be immediately taken by the government to prevent the possibility of their being interrputed by the Indians.

On this subject I have taken much pains to consult with most of the leading men connected with these great enterprises, and also with nearly all of the head chiefs of the Indians that range on their lines in this

Territory, and have, after mature deliberation, come to the conclusion that the only manner in which this can be effected to the entire satisfaction and protection of all the parties concerned, is by a treaty between the United States and the tribes of Indians ranging in this superintendency.

In recent consultations or "talks" with the Wash-a-kee and Sho-kub, the head chiefs of the Shoshones or Snake Indians, Navacoots and Pe-tut-neet, chiefs of the Ute nation, and many of the sub-chiefs of both nations, I find that they are unanimously in favor of a treaty with the United States, and agree with me in considering that to be the only effectual way to check the stealing propensities of some of their Indians; and from information gleaned from them on various occasions, I have made the following memorandum in regard to the probable cost and effect of a treaty.

They express their willingness to cede to the United States all the lands they claim in this Territory, with the exception of reservations necessary for their homes; and ask, in return, that the United States shall make them annual presents of blankets, beads, paint, calico, ammunition, &c., with occasional supplies of beef and flour sufficient to make them comfortable, which I estimate can be done with a small addition to the usual appropriation.

* * * * *

I cannot too strongly recommend this course to the department, and sincerely hope that it will meet with that prompt attention that, to my mind, the importance of the subject entitles it. * * *

4. In and prior to 1850, and for several years subsequent thereto, the Government was doing practically nothing for these Indians in the way of providing them with food or supplies. The Indian agents and superintendents in the territory inhabited by the Shoshone Indians frequently went among these Indians, especially those inhabiting the routes of western travel, for the purpose of endeavoring to preserve peace and, to that end, gave the Indians along these routes of travel such presents as they were able to provide, which presents were gratefully received by the Indians. All the Indians encountered by these officials as far west as central Nevada and Salmon Falls on the Shoshone River in Idaho professed friendship for the white people and the Government and showed a real desire for peace; they begged

of the Government officers provisions and supplies from the Government because of the destruction of their only means of livelihood. As a result of the conditions mentioned, certain Indians of the Northwestern Bands of the Shoshones banded together and made attacks and committed depredations from time to time upon emigrant trains. The conduct of certain unscrupulous white men aggravated and encouraged these attacks and depredations. Because of these conditions and with the desire to prevent or to ameliorate them, the United States' agents and superintendents of Indian affairs in that territory constantly made recommendations that the Government make some provision to furnish them with means of aiding the Indians, by furnishing them with food and supplies which would have the effect of bringing about peace and friendship among the Indians. They also recommended that a treaty be entered into with the Shoshone Indians which would provide for care of the Indians and the safety of the emigrants and settlers. These officers were positive in their assertions that this would bring about a condition of permanent peace and friendship with the Indians, because they had found that all the Shoshone Indians with whom they had come in contact in their travels sincerely desired peace. The Commissioner of Indian Affairs and the Secretary of Interior in their annual reports to Congress from 1850 forward made similar recommendations to the Congress. However, it was not until 1862 that any steps were taken by Congress to this end, when, by the Act of July 5, 1862, 12 Stat. 512, 529, being an act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various other Indian tribes, the Congress appropriated $20,000 "for defraying the expenses of negotiating a treaty with the Shoshonees or Snake Indians, or so much thereof as may be needed, to be expended under the direction of the Secretary of the Interior."

On February 26, 1862, prior to the passage of the appropriation act of July 5, the Secretary of the Interior wrote the chairman of the House Committee of Indian Affairs in part as follows:

> The Acting Commissioner of Indian Affairs has submitted to this Department a resolution of the House of

Reps of the 30th ult°, instructing your Committee to "inquire into the expediency of making an appropriation to defray the expenses of holding treaties with the Indians in Utah, with a view to the purchase of their lands," &c. I return the resolution, and enclose herewith, a copy of the report of the Acting Comm'r, dated the 25th ins't containing the views of that officer as to the necessity and propriety of negotiating with the Indian Tribes of Utah, the expense of which will, it is estimated, be $45,000. * * *

The lands owned by the Indians are, most of them, unfit for cultivation, and it is not probable that any considerable portion of them will be required for settlement for many years. The principal inducement to make treaties with those tribes is the control which the Government would thereby be enabled to exercise over them, by which additional security would be given to settlers in the Territory, and to the Overland Mail and Telegraph Lines.

How far it will be proper to incur expense with a view to this obejct, is a matter which must be confided to the judgment of Congress.

5. Pursuant to the appropriation act of July 5, the President appointed a special commission consisting of James Duane Doty, Superintendent of Indian Affairs for the Territory of Utah, later Governor of that Territory, Luther Mann, Indian agent in the same Territory, and Henry Martin, a former superintendent of Indian Affairs for Utah Territory. The failure of Commissioner Martin to reach Utah with provisions and presents in time to meet the Indians before cold weather set in delayed negotiations until June of 1863. Commissioner Martin returned to Washington, after which Commissioners Doty and Mann, assisted by General P. Edward Connor and Governor James W. Nye, concluded the negotiations at a later date, as will hereinafter appear.

6. On July 22, 1862, the Commissioner of Indian Affairs gave Commissioners Doty, Mann, and Martin a letter of instructions as follows:

Congress at its recent Session having appropriated Twenty Thousand Dollars for the purpose of making a treaty with the Shoshonees or Snake Indians, you have been designated by the President to carry into effect the object of the said appropriation. No sufficient reports

of explorations are in the custody of this office to enable me to state definitely the boundaries of the country inhabited and claimed by these Indians, but it is understood that they inhabit the country in the northern part of Utah and eastern portion of Washington Territories, through which lies the route of the overland mail, and the emigrant route through Utah and into Washington Territory and it is mainly to secure the safety of the travel along these routes that a treaty is desirable.

It is not expected that the treaty will be negotiated with a view to the extinguishment of the Indian title to the land, but it is believed that with the assurances you are authorized to make of the amicable relations which the United States desires to establish and perpetuate with them, and by the payment of Twenty thousand dollars of annuities in such articles as by the President may be deemed suitable to their wants for which you are authorized to stipulate, you will be enabled to procure from them such articles of agreement as will render the routes indicated secure for travel and free from molestation; also a definite acknowledgment as well of the boundaries of the entire country they claim, as of the limits within which they will confine themselves, which limits it is hardly necessary to state should be as remote from said routes as practicable.

It must however be borne in mind that in stipulating for the payment of annuities the sum mentioned above is not to be exceeded, so that if for any reason, you are unable to treat with all the bands of the Shoshonees, the amount of annuities stipulated to be paid must be such a proportion of said sum as the number of the bands treated with bears to the number of the entire nation.

It will also be well so to frame the treaty that while on the one hand it is expressed that the United States being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of the game along the route traveled by whites, are willing to fairly compensate them for the same, the Indians on the other hand shall acknowledge the reception of the annuities stipulated for, as a full equivalent therefor, and shall pledge themselves at all times hereafter to refrain from depredations and maintain peaceable relations with the United States and their citizens.

Should you find it impracticable to make one treaty which will secure the good will and friendship of all

the tribes or bands of Shoshonee Indians, you will then negotiate only with that tribe or band which is most dangerous to emigrants and settlers upon the route of travel to the Pacific, which has the largest amount of travel over it. Although the safe transmission of the mails is an important object yet it is less important than the preservation of the lives of the emigrants.

If therefore you shall find it impracticable with the means at your disposal to make a treaty which shall afford complete protection to the route of travel over which the mails are carried and also the overland route of travel north of that, and you can only secure protection for one of said routes, you will negotiate a treaty with such tribe or bands as will secure that protection to the route over which the largest amount of travel and emigration passes without reference to the mails.

I have to direct that you arrange the times and places of your councils with the Indians that so far as practicable the entire nation shall be represented, which it is presumed the amount appropriated will with proper economy enable you to very nearly if not completely accomplish.

Mr. Martin, one of your Commissioners having filed the necessary bond, has been entrusted with the funds and will make all such arrangements for the purchase of goods and disbursement of money as may be necessary.

7. By reason of the inability of the treaty commissioners to proceed with the performance of their mission of meeting and negotiating with the Shoshone Indians, attacks and depredations were made upon the emigrants and white settlers by some bands of the Shoshone Indians during the winter of 1862-1863 with the result that in January 1863 Colonel Connor, commanding the Military District of Utah, learning of the encampment on the bank of the Bear river in southeastern corner of Idaho of a large body of Indians composed of some of the Indians of plantiff bands, attacked them in force and killed 224; a band of Indians under Sanpitz, one of the signers of the treaty subsequently made with plaintiff bands, as hereinafter mentioned, was almost exterminated.

8. June 1, 1863, the Commissioner of Indian Affairs wrote to Mr. Doty, Superintendent of Indian Affairs for the

Territory of Utah and chairman of the Treaty commissioners, as follows:

I have to acknowledge the receipt of your letter of 30th March last in relation to the proposed Treaty with the Shoshonees.

I exceedingly regret that unforeseen circumstances have combined to cause so much delay in the attempt to effect the contemplated negotiations. From the instruction forwarded to late Special Agent Martin in February last I had reason to suppose that fund would be at the disposal of yourself and Agent Mann so that a council with the Indians could be held early in the Spring. In this however I was disappointed as late Agent Martin returned bringing with him the unexpended balance of the funds entrusted to him.

An answer to your letter has been delayed some days with a view to consulting with Gov. Nye (who has been expected in this City) in relation to the Treaty. As it is now probable that Gov. Nye will not now visit this place I have to inform you that the balance of the funds returned by late Agent Martin amounting to the sum of $15,783.88 will be deposited to your credit with John I. Cisco Asst. Treas. U. S. at New York when notice shall be received from you as to the time that the negotiation will be attempted, and that the funds are needed for that purpose.

Agent Martin having wholly failed in accomplishing the object of his appointment, the negotiation will henceforth be confided to you and Agent Mann under the instructions heretofore issued, unless it shall be found practicable, and in your judgment expedient to associate with you Gov. Nye of Nevada and Gov. Wallace of the New Territory of Idaho in addition to Agent Mann, in which event you will be authorized to do so, but I suggest that no great delay, nor any considerable expense should be incurred for the purpose.

In regard to the suggestions of your letter of 27th Nov. last in relation to the necessity of treaties with the Utahs and Bannucks I have to state that you are authorized to make a joint treaty with these tribes and the Shoshones if one can be negotiated with the fund appropriated for the purpose of treating with the latter and now at your disposal. While I do not hesitate in view of the urgent necessities of the case and the weighty reasons therefor suggested by you to divert the specific application of the appropriation to the extent indicated, I do not feel warranted in attempt-

ing a negotiation with the Utahs and Bannucks in advance of an appropriation, unless it shall be found practicable to accomplish it as above indicated.

In view of the limited amount of the appropriation it is exceedingly vexatious that so much thereof should have been expended by late Agent Martin to so little purpose and that the necessity for the exercise of the strictest economy should thereby be enhanced to so great an extent. I have however full confidence that whatever is practicable will be accomplished by yourself and those who may be associated with you.

Trusting that I may receive an early and favorable report from you I remain

On June 20, 1863, Commissioner Doty wrote the Commissioner of Indian Affairs as follows:

I have the honor to acknowledge the receipt of your letter, dated May 22, 1863, in relation to my northern expedition, and to report:

That I returned to this city from that expedition on the 19th instant, having been absent six weeks in the Indian country, and travelled over eight hundred miles. I accompanied General Conner to Snake River Ferry, two hundred miles, where we separated, and he proceeded with his cavalry up the Blackfoot river, and south across the dividing ridge to Soda Springs, at which he has established a military post, on the old California and Oregon roads. The Bannacks and Shoshonees I met in small bands, and after consulting with them, I am satisfied they are disposed to be peaceable and friendly. The exhibition of a cavalry force among them apparently satisfied them that they could be reached by the power of the government, and that they would certainly be punished if they committed depredations upon white men. There are, undoubtedly, as they say, some bad men among them, who will not be controlled by the chiefs, but efforts are made by the peaceable Indians to restrain them. The only bands that appear determined to continue hostilities were those of Pokatelo, Sagowitz, and Sanpitz, and with these I could obtain no communication. They must be left to General Conner's troops.

When at Snake River ferry, two express-men arrived, bringing information that a large body of Shoshonees and Bannacks were assembled at Kamash prairie, about one hundred miles further north, on the road used by emigrants to Bannack city, with the intention to either fall upon the miners on Beaver Head and its branches,

or upon the emigrants along the road between South Pass and Bridger. If this could be prevented by an interview, I felt it my duty to make the attempt, and therefore proceeded with my interpreter to the place indicated to meet them. At Kamash prairie I found but few Indians—those remaining stating that those who had been there had gone in different directions to the mountains to hunt, and that they were all friendly to the whites, and disposed to be peaceable. They complained of the white men at Bannack city firing upon them in the streets of that place, when they were there upon a friendly visit, and molesting no one, and killed their chief, Shanog, and two others. They said they did not intend to revenge this wanton act, because it was committed by men who were drunk, and they thought all the people there were drunk at the time. I advised them not to go there again, and to keep away from drunken white men; to be kind, and render good service to the emigrants along the road, and that they would be generously rewarded. I gave them a few presents of blankets, &c. However, fearing there might be trouble from this gross attack, and that other bands might not be disposed to overlook it, I determined, as there was no Indian agent in this section of country, to proceed to Bannack city, about eighty miles distant, to ascertain the truth of their statement, and to counsel with those who might be along the road through the mountains. On entering the mountains I encountered a large band of Shoshonees, who manifested a friendly spirit, expressed a desire to be at peace, and thankfully accepted the few presents I was able to make them. On arriving at Bannack I learned with regret that the statement by the Indians of the murder of their people was true; that they were fired upon as they were sitting quietly in the street, by a dozen white men, and that their sole object in visiting the place was to give up a child—which they did—which had been demanded of them on the supposition that it was a stolen white child. I saw the child, and have no doubt that it is a half-breed, and was rightfully in their possession. I would have adopted legal measures for the punishment of these offenders, but there were no civil officers there, and no laws but such as have been adopted by miners. The matter must rest until the organization of the government of Idaho.

Whilst at Bannack, I ascertained that bands of Flat-heads had passed on the road by which I came, in search of the Bannacks and Shoshonees, for the purpose of stealing their horses and making war upon them.

Deeming it unsafe to return alone, I employed Mr. Dempsey, an excellent interpreter, to send a guide and guard of Indians with me. These accompanied me faithfully to the settlement of Box Elder, and will, on their way back, give useful information to those of their nation they meet.

All the Indians I met, during my absence, appeared desirous to form a treaty with the United States, and I told them that when the commissioners were ready to meet them I would send a runner to them to inform them of the time and place for them to assemble.

On the same date Commissioner Doty wrote to the Commissioner of Indian Affairs another letter as follows:

Your letter of instructions in relation to the proposed treaty with the Shoshones, dated June 1, 1863, I have the honor to acknowledge, and to inform you that I shall proceed the coming week to Fort Bridger for the purpose of meeting the Shoshonees who are assembled there, some of whom I met on my late expedition, and of treating with them according to your instructions of the 22d of July, 1862, and of those now given.

Many of these Indians have been hostile, and have committed depredations upon the persons and property of emigrants and settlers, but now express a strong desire for peace. Agent Mann informs me that he is now feeding them under your authority; I therefore hasten to meet them, that some arrangement may be made by which they can with satisfaction return to their hunting grounds, and upon terms which shall secure peace hereafter, safety to the emigrants and travellers, and relieve the department from the expense now being incurred.

These are about one-third of the Shoshones with whom treaties may be held, and I shall endeavor to limit the expenditures to the least amount to obtain the objects desired by government.

* * * * *

The Shoshonee Bands are scattered over so vast an extent of country that it will be necessary for the commissioners to meet them at several points. The whole nation can never be assembled without bringing them hundreds of miles.

9. Following June 20, 1863, the Government's treaty commissioners met with the Shoshone Tribe of Indians and the Bannock bands in groups at different points and on different dates between July 2 and October 14, 1863, as hereinafter

mentioned, and made treaties with them. The treaty commissioners first met at Ft. Bridger, Wyoming, with Washakie, the principal chief of the entire Shoshone Tribe of Indians, and the chiefs, principal men, and warriors of the Indians with him, where they entered into a treaty (18 Stat. 685) as follows:

Eastern Shoshone Treaty

Articles of Agreement made at Fort Bridger, in Utah Territory, this 2d day of July, A. D. 1863, by and between the United States of America, represented by its Commissioners, and the Shoshone Nation of Indians, represented by its Chiefs and Principal Men and Warriors of the Eastern Bands, as follows:

Article I

Friendly and amicable relations are hereby reestablished between the bands of the Shoshonee nation, parties hereto, and the United States; and it is declared that a firm and perpetual peace shall be henceforth maintained between the Shoshonee nation and the United States.

Article II

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be and remain forever free and safe for the use of the government of the United States, and of all emigrants and travellers under its authority and protection, without molestation or injury from any of the people of said nation. And if depredations should at any time be committed by bad men of their nation, the offenders shall be immediately seized and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over said routes is hereby guaranteed by said nation. Military agricultural settlements and military posts may be established by the President of the United States along said routes; ferries may be maintained over the rivers wherever they may be required; and houses erected and settlements formed at such points as may be necessary for the comfort and convenience of travellers.

Article III

The telegraph and overland stage lines having been established and operated through a part of the Sho-

shonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said nation; and that their property, and the lives of passengers in the stages, and of the employees of the respective companies, shall be protected by them.

And further, it being understood that provision has been made by the Government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by said nation that said railway, or its branches, may be located, constructed, and operated, without molestation from them, through any portion of the country claimed by them.

Article IV

It is understood the boundaries of the Shoshonee country, as defined and described by said nation, is as follows: On the north, by the mountains on the north side of the valley of Shoshonee or Snake River; on the east, by the Wind River mountains, Peenahpah river, the north fork of Platte or Koo-chin-agah, and the north Park or Buffalo House; and on the south, by Yampah river and the Uintah mountains. The western boundary is left undefined, there being no Shoshonees from that district of country present; but the bands now present claim that their own country is bounded on the west by Salt Lake.

Article V

The United States being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by whites, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, the United States promise and agree to pay to the bands of the Shoshonee nation, parties hereto, annually for the term of twenty years, the sum of ten thousand dollars, in such articles as the President of the United States may deem suitable to their wants and condition, either as hunters or herdsmen. And the said bands of the Shoshonee nation hereby acknowledge the reception of the said stipulated annuities, as a full compensation and equivalent for the loss of game, and the rights and privileges hereby conceded.

Article VI

The said bands hereby acknowledge that they have received from said Commissioners provisions and clothing amounting to six thousand dollars, as presents, at the conclusion of this treaty.

This treaty was designated by the commissioners as an agreement with the "Eastern Bands" of the Shoshone Nation of Indians for the reason that the bands of Indians present and participating therein were located in the eastern portion of the territory inhabited or occupied by the Indians of the Shoshone Nation. Ft. Bridger, the place where the treaty was made, was located near the southwestern corner of Wyoming, east of the Porteneuf range of mountains. This treaty was transmitted to the Commissioner of Indian Affairs by the treaty commissioners with a letter of July 3, 1863, as follows:

> We have the honor to transmit herewith a Treaty which we concluded yesterday with the Shoshonee nation, which we hope will be approved by the Department. The terms were more advantageous than we had expected to obtain.
>
> The representation of the nation was very large, being from all the bands of the nation except four. The parties treating occupy the whole of the country east of—and including—Salt Lake valley. The two principal chiefs of the nation, Washakee and Wanapitz, were present.
>
> One of these absent Bands is in Ruby valley and on the Humboldt mountains and river. The other three continue their hostilities, but are now much reduced in numbers, and have been driven by the Troops north to the valley of Snake river. We may now perhaps be able to get messengers to them, and induce them to treat with us for peace.
>
> The amount expended in making this Treaty, is about six thousand dollars; the account, with the vouchers, will be forwarded without delay. There was near one thousand Shoshonees—and no Bannacks or Utahs—on the ground. They have been fed, according to your instructions, for the past month, which has somewhat increased the expenditure of the Treaty fund, to which it is charged.

10. Thereafter, on July 30, the treaty commissioners assembled at Box Elder, in Utah Territory, and met with

plaintiff bands of the Shoshone nation or tribe which inhabited and occupied the territory west of the range of mountains above mentioned and the territory occupied and possessed by Chief Washakie and the bands with whom the treaty of July 2 had been made. The commissioners there made a treaty which was signed on behalf of these Indians by Pocatello, chief of one of the bands, and eight chiefs of other bands of the Shoshone tribe. Pocatello was regarded as the principal chief under Washakie of this group of bands. These Indians were designated by the treaty commissioners and by the treaty entered into as the "Northwestern Bands" of Shoshone Indians. This treaty (13 Stat. 663) was as follows:

Northwestern Shoshone Treaty

Articles of agreement made at Box Elder, in Utah Territory, this 30th day of July, A. D., 1863, by and between the United States of America, represented by Brigadier General P. Edward Connor, commanding the military district of Utah, and James Duane Doty, commissioner, and the northwestern bands of the Shoshonee Indians, represented by their chiefs and warriors:

ARTICLE I. It is agreed that friendly and amicable relations shall be reestablished between the bands of the Shoshonee Nation, parties hereto, and the United States, and it is declared that a firm and perpetual peace shall be henceforth maintained between the said bands and the United States.

ARTICLE II. The treaty concluded at Fort Bridger on the 2nd day of July, 1863, between the United States and the Shoshonee Nation, being read and fully interpreted and explained to the said chiefs and warriors, they do hereby give their full and free assent to all of the provisions of said treaty, and the same are hereby adopted as a part of this agreement, and the same shall be binding upon the parties hereto.

ARTICLE III. In consideration of the stipulations in the preceding articles, the United States agree to increase the annuity to the Shoshonee Nation five thousand dollars, to be paid in the manner provided in said treaty. And the

said northwestern bands hereby acknowledge to have received of the United States, at the signing of these articles, provisions and goods to the amount of two thousand dollars, to relieve their immediate necessities, the said bands having been reduced by the war to a state of utter destitution.

ARTICLE IV. The country claimed by Pokatello, for himself and his people, is bounded on the west by Raft River and on the east by the Porteneuf Mountains.

This treaty was transmitted by the treaty commissioners with a letter of July 30, 1863, from Commissioner Doty to the Commissioner of Indian Affairs, as follows:

> A treaty of peace was this day concluded at this place by General Connor and myself with the bands of the Shoshones, of which Pocatello, San Pitch [Sanpitz], and Sagwich are the principal chiefs. This information is given that these Shoshones may not be injured when met by the troops, if they are at the time behaving themselves well. A treaty of peace has also been entered into at Fort Bridger with other bands of the Shoshones, and it is understood that all of that nation are at peace with the United States and are under a pledge to remain friendly.

11. Thereafter on October 1, 1863, the commissioners assembled and met with the bands of the Shoshone Nation of Indians at Ruby Valley in what is now northeastern Nevada, which Indians occupied and possessed an area of country in the northeastern portion of the territory of Nevada, and there entered into a treaty with these bands with a letter of July 30, 1863, from Commissioner Doty to the Commissioner of Indian Affairs as follows:

Western Shoshone Treaty

> Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this 1st day of October, A. D., 1863, between the United States of America, represented by the undersigned commissioners, and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs, and Principal Men and Warriors, as follows:
>
> Article I
>
> Peace and friendship shall be hereafter established and maintained between the Western Bands of the

Shoshonee nation and the people and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States within their country, shall cease.

Article II

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all emigrants and travelers under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their nation, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travelers passing peaceably over either of said routes is hereby guarantied by said bands.

Military posts may be established by the President of the United States along said routes or elsewhere in their country; and station houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travelers or for mail or telegraph companies.

Article III

The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said bands, and that their property and the lives and property of passengers in the stages and of the employes of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by the said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of the country claimed or occupied by them.

Article IV

It is further agreed by the parties hereto, that the Shoshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required. Mills may be erected and timber taken for their use, as also for building or other purposes in any part of the country claimed by said bands.

Article V

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:

On the north by Wong-goga-da Mountains and Shoshonee River Valley; on the west by Su-non-to-yah Mountains or Smith Creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

Article VI

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

Article VII

The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes traveled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, and of their faithful observance by the said bands, the United States promise and agree to pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty

years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

Article VIII

The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to five thousand dollars as presents at the conclusion of this treaty.

12. Thereafter, on October 12, 1863, the treaty commissioners assembled and met with the Shoshonee-Goship Bands of Indians belonging to and affiliated with the Shoshone Nation of Indians at Tuilla Valley, just south of Great Salt Lake in what is now the northwestern portion of Utah. These bands of Indians occupied a territory lying in western Utah and eastern Nevada, south of Salt Lake and south of the territory occupied by the Northwestern Bands and east of that occupied by the Western Bands of Shoshones. This treaty (13 Stat. 681) was as follows:

Shoshonee-Goship Treaty

Treaty of peace and friendship made at Tuilla Valley, in the Territory of Utah, this 12th day of October, A. D. 1863, between the United States of America, represented by the undersigned commissioners, and the Shoshonee-Goship bands of Indians, represented by their chiefs, principal men, and warriors, as follows:

Article I. Peace and friendship is hereby established and shall be hereafter maintained between the Shoshonee-Goship bands of Indians and the citizens and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States, within their country, shall cease.

ARTICLE II. It is further stipulated by said bands that the several routes of travel through their country now or hereafter used by white men shall be forever free and unobstructed by them, for the use of the Government of the United States, and of all emigrants and travellers within it under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their own or other tribes within their country, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences may deserve; and the safety of all travellers passing peaceably over either of said routes is hereby guaranteed by said bands.

Military posts may be established by the President of the United States along said routes, or elsewhere in their country; and station-houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travellers or for the use of the mail or telegraph companies.

ARTICLE III. The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through the country occupied by said bands, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said bands, and that their property, and the lives and property of passengers in the stages, and of the employees of the respective companies, shall be protected by them.

And further, it being understood that provision has been made by the Government of the United States for the construction of a railway from the plains west to the Pacific Ocean, it is stipulated by said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of the country claimed or occupied by them.

ARTICLE IV. It is further agreed by the parties hereto that the country of the Goship tribe may be explored and prospected for gold and silver, or other minerals and metals; and when mines are discovered they may be worked, and mining and agricultural settlements formed and ranches established wherever they may be required. Mills may be erected and timber taken for their use, as also for building and other purposes, in any part of said country.

ARTICLE V. It is understood that the boundaries of the country claimed and occupied by the Goship tribe, as defined and described by said bands, are as follows:

On the north by the middle of the Great Desert; on the west by Steptoe Valley; on the south by Tooedoe or Green Mountains; and on the east by Great Salt Lake, Tuilla, and Rush Valleys.

ARTICLE VI. The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life which they now lead, and become settled as herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary; and they do also agree to remove their camps to such reservations as he may indicate, and to reside and remain thereon.

ARTICLE VII. The United States being aware of the inconvenience resulting to the Indians, in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same. Therefore, and in consideration of the preceding stipulations, and of their faithful observance by said bands, the United States promise and agree to pay to the said Goship tribe, or to the said bands, parties hereto, at the option of the President of the United States, annually, for the term of twenty years, the sum of one thousand dollars, in such articles, including cattle for herding or other purposes, as the President shall deem suitable for their wants and condition either as hunters or herdsmen. And the said bands, for themselves and for their tribe, hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded; and also one thousand dollars in provisions and goods at and before the signing of this treaty.

13. Thereafter, on October 14, 1863, the treaty commissioners assembled and met at Soda Springs, in what is now eastern Idaho, with certain bands of Bannocks and Shoshone Indians designated by the treaty commissioners as "the mixed bands of Bannocks and Shoshonees," and entered into a treaty with them, which treaty was signed by thirteen chiefs of these bands. This treaty (5 Kapp. 693) was as follows:

Mixed Bands Treaty

Treaty of peace and friendship, made at Soda Springs, in Idaho Territory, this 14th day of October A. D., 1863, by and between the United States of America,

represented by Brigadier General P. Edward Connor, commanding the military district of Utah, &c., and James Duane Doty, commissioner, and the undersigned chiefs of the mixed bands of Bannacks and Shoshonees, occupying the valley of Shoshonee River, as follows:

Article I

It is mutually agreed that friendly and amicable relations shall be reestablished between the said Bands and the United States, and that a firm and perpetual peace shall be henceforth maintained between the said bands and the United States.

Article II

The treaty concluded at Fort Bridger, on the second day of July, 1863, between the United States and the Shoshonee nation, and also the treaty concluded at Box Elder, on the 30th day of July 1863, between the United States and the Northwestern bands of the Shoshonee nation, being read and fully interpreted and explained to the said chiefs, they do hereby give their full and free assent to all of the provisions of said treaties, and the same are hereby adopted as a part of this treaty, and the same shall be binding upon the parties hereto, the said bands sharing in the annuities therein provided for the Shoshonee nation.

Article III

The said bands, in addition, agree that the roads now used by white men between Soda Springs and the Beaver Head mines, and between Salt Lake and the Boise River mines, as also such other roads as it may be necessary or convenient for the white men to make and use between said places, or between other points within their country, shall at all times be free and safe for travel; and no depredations shall be committed upon white men in any part of their country. And the said bands hereby acknowledge to have received of the United States, by its commissioner, at the signing of these articles, provisions, and goods, to the amount of three thousand dollars, to relieve their immediate wants before their departure to their hunting grounds.

Article IV

The country claimed by the said bands jointly with the Shoshonee nation, extends, as described by them,

from the lower part of Humboldt river and the Salmon Falls, on Shoshonee river, easterly to the Wind River mountains.

14. On August 30, 1863, after the five treaties hereinbefore mentioned had been made with the Shoshone Indians, Treaty Commissioner James Duane Doty wrote the Commissioner of Indian Affairs a letter as follows:

> Acknowledging your letter dated July 22d I have to request that two or more copies of the Map lately prepared at the General Land Office may be procured and sent to me, that I may be enabled to show the boundaries of the Country ceded by the Shoshonees. The most accurate map which I have of this country is the Military Map of Utah; but this does not exhibit the northern part of the Shoshonee Country.

September 22, 1863, the Commissioner of Indian Affairs replied and transmitted copies of the map requested. November 10, 1863, Commissioner Doty wrote the Commissioner of Indian Affairs as follows:

> The map transmitted to me by the department is herewith returned, with the exterior boundaries of the territory claimed by the Shoshonees in their recent treaties, as also the lines of the country occupied by different portions of the tribe, indicated upon it as correctly as the map will allow. They fixed their eastern boundary on the crest of the Rocky Mountains; but it is certain that they, as well as the Bannacks, hunt the buffalo below the Three Forks of the Missouri, and on the headwaters of the Yellowstone and Wind rivers.
>
> As none of the Indians of this country have permanent places of abode, in their hunting excursions they wander over an immense region, extending from the fisheries at and below Salmon Falls, on the Shoshonee river, near the Oregon line, to the sources of that stream, and to the buffalo country beyond. The Shoshonees and Bannacks are the only nations which, to my knowledge, hunt together over the same ground.
>
> Replying further to your letter, dated July 22, 1863, I beg leave to refer to my letter to the Commissioner, dated February 7, 1862, in relation to the Indian tribes in this superintendency; and to add that the bands represented at the treaty of Fort Bridger, on the second day of July last, it was estimated, numbered be-

tween three and four thousand souls, over a thousand of whom were present at, and immediately after, the conclusion of the treaty.

They are known as Waushakee's band, (who is the principal chief of the nation,) Wonapitz's band, Shauwuno's band, Tibagon's band, Pecastoagah's band. Totimee's band, Ashingodimah's band, (he was killed at the battle on Bear river), Sagowitz's band, (wounded at the same battle,) Oretzimawik's band, Bazil's band, Sanpitz's band. The bands of this chief and of Sagowitz were nearly exterminated in the same battle.

The chiefs at this treaty, in fact, represented nearly the whole nation; and they were distinctly informed and they agreed that the annuities provided in this treaty, and such others as might be formed, were for the benefit of all the bands of the Shoshonee nation who might give their assent to their terms; and this has been the understanding at each treaty.

At the treaty concluded at Box Elder on the 30th of July, the first object was to effect and secure a peace with Pokatello, as the road to Beaver Head gold mines, and those on Boisé river, as well as the northern California and southern Oregon roads, pass through his country. There were present Pokatello's band, Tormontso's band, Sanpitz's band, Tosorvetz's band, Bear Hunter's band, (all but seven of this band were killed at Bear river battle,) Sagowitz's band. This chief was shot by a white man a few days before the treaty, and could not come from his *weekeeup* to the treaty ground, but he assented to all of its provisions. He and Sanpitz endeavored to be at Fort Bridger, to unite in the treaty there, but did not arrive in time. The chiefs of several smaller bands were also present and signed the treaty, which is considered of more importance than any made this season, in saving the lives and securing from depredations the property of our citizens, emigrants as well as others. These bands are generally known as "the Sheep-Eaters," and their number is estimated at one thousand.

At the treaty concluded at Ruby valley, on the 1st of October, the western Shoshonees were represented by the two principal bands, the Tosowitch (White Knife) and Unkoahs. From the best information I could get I estimated the western bands, sometimes called Shoshonee Diggers, at twenty-five hundred souls; but the bands on the Lower Humboldt and west of Smith's creek are not included in this estimate. Governor Nye proposed to meet some of them at Reese river, on his return to Carson from Ruby.

At the treaty at Tuilla valley, on the 12th of October, with the Goship or Kumumbar bands, who are connected with the Shoshonees, and are chiefly of that tribe, there were three hundred and fifty present. Others from Ibapah, Shell creek, and the Desert, would have joined them but for their fear of the soldiers; they number about one hundred more; and there is also a portion of this tribe who are mixed with the Pahvontee tribe, and occupy the southern part of the Goship country, amounting to two hundred more. They are the poorest and most miserable Indians I have met; they have neither horses nor guns. I have seen several of them at work for farmers at Deep creek and Grantsville, and therefore conclude that they would soon learn to cultivate the ground for themselves, and take care of stock, if they were assisted in a proper way. They have expressed a strong desire to become settled as farmers, and I should be glad to see them located as such, at a distance from the overland mail route. More than a hundred of them have been killed by the soldiers during the past year, and the survivors beg for peace. It was the intention and understanding that all of the Goship tribe shall participate in the benefits of the treaty.

At the treaty of Soda Springs, on the 14th of October, with the mixed bands of Shoshonees and Bannacks roaming in the valley of Shoshonee river, there were one hundred and fifty men present with their families.

Tindoah and the chiefs of several other bands sent word that they assented to the treaty, and desired to be considered parties to it, but they could not remain, as it was so late in the season they were compelled to leave for their buffalo hunting-grounds. I have seen these bands on Snake river, in the month of May last, in council, found them peaceable and friendly, and explained to them the objects for which it was proposed to hold a treaty before the snow fell.

Those now present were, Toso-kwauberaht, the principal chief of the Bannack nation, commonly known as Grand Coquin, Tahgee, Matigund, and other principal men. This last chief and his band live at the Shoshonee River ferry, where he meets all the travelers to and from the mines. He has always been friendly to them; and all of these bands can render great service to the emigrants, or do them great injury. They number about one thousand souls, as near as I can ascertain.

The whole number of Shoshonee, Goships, and Bannacks, who are parties to these treaties, may be estimated at eight thousand six hundred and fifty.

The amount to be paid to them annually in goods, &c., is—to the Shoshonees and Bannacks twenty thousand dollars and to the Goships one thousand dollars, for the term of twenty years. This last sum I think ought to be increased to two thousand dollars, especially if they are to be settled as husbandmen or herdsmen.

The importance of these treaties to the government and to its citizens can only be appreciated by those who know the value of the continental telegraph and overland stage to the commercial and mercantile world, and the safety and security which peace alone can give to emigrant trains, and to the travel to the gold discoveries in the north, which exceed in richness—at least in the quality of the gold—any discoveries on this continent.

The pertinent portion of the map referred to and transmitted by Commissioner Doty with the above-quoted letter, showing the approximate exterior boundaries estimated by him is reproduced on the following page. The word "North" has been written on the map by the court for the purpose of this opinion. The heavy line thereon was intended to represent the approximate exterior boundary of the entire territory in which the entire Shoshone tribe of Indians and the Bannock bands of Indians affiliated with them had been found to live, roam and hunt, and, to some extent, claimed or described by them as set forth in the treaties. The smaller lines on the map in the southwest portion thereof were intended to indicate approximately the territory described (1) by Pocatello, (2) the Western Bands, and (3) the Shoshonee-Goship Bands.

EXHIBIT B.—Map prepared by Dory which accompanied treaties to Senate.

15. In negotiating and making these five treaties with the various groups or bands of Shoshone and Bannock Indians, the treaty commissioners representing the United States and the Indians did not negotiate or agree with reference to the acknowledgment by the United States of any exclusive use and occupancy right or title of the Indians to the territory to the extent described or claimed by them at the request of the treaty commissioners; nor did the treaty commissioners on behalf of the United States negotiate or agree with the Indians with reference to the relinquishment by the Indians of any claim which they might make or have with

reference to any territory. It was not the purpose of the treaty commissioners to agree or acknowledge on behalf of the United States as to any rights or title to any territory or as to boundaries and they made no attempt to ascertain accurately the boundaries of any territory which the Indians may have actually occupied, possessed and used to the exclusion of other Indians or tribes of Indians. The matter of Indian use and occupancy rights or the extinguishment of any claim or right which the Indians might make or have to such use and occupancy, as a stipulation or acknowledgment in the treaties, did not enter into the negotiations and was left out of consideration in the drafting and making of the treaties in question. The primary purpose of the United States and the treaty commissioners representing it in negotiating and making the treaties in question was to bring about peaceful and amicable relations between the Government and the Indians of the Shoshone Nation, or tribe, and the Bannock bands by making provision for annuities, in stated amounts in such articles as the President might deem suitable to their wants and conditions, to the end that routes of travel by the whites through the portion of the country occupied by the Indians and the settlements therein by the whites might be free from attacks and depredations by the Indians.

16. The five treaties hereinbefore mentioned were transmitted to the President by the Secretary of Interior, and on or about January 5, 1864, the President transmitted the treaties to the Senate with the following communication:

> I herewith lay before the Senate, for its constitutional action thereon, the following described treaties, viz:
>
> A treaty made at Fort Bridger, Utah Territory, on the 2d day of July, 1863, between the United States and the chiefs, principal men, and warriors of the eastern bands of the Shoshonee nation of Indians;
>
> A treaty made at Box Elder, Utah Territory, on the 30th day of July, 1863, between the United States and the chiefs and warriors of the northwestern bands of the Shoshonee nation of Indians;
>
> A treaty made at Ruby Valley, Nevada Territory, on the 1st day of October, 1863, between the United States and the chiefs, principal men, and warriors of the Shoshonee nation of Indians;

A treaty made at Tuilla Valley, Utah Territory, on the 12th day of October, 1863, between the United States and the chiefs, principal men, and warriors of the Goship bands of Shoshonee Indians;

A treaty made at Soda Springs, in Idaho Territory, on the 14th day of October, 1863, between the United States and the chiefs of the mixed bands of Bannacks and Shoshonees, occupying the valley of the Shoshonee river;

A letter of the Secretary of the Interior, of the 5th instant; a copy of a report, of the 30th ultimo, from the Commissioner of Indian Affairs; a copy of a communication from Governor Doty, superintendent of Indian affairs, Utah Territory, dated November 10, 1863, relating to the Indians parties to the several treaties herein named; and a map, furnished by that gentleman, are herewith transmitted.

17. Each of the five treaties was ratified by the Senate, and to each of the treaties made with the Eastern Shoshones on July 2, the Northwestern Shoshones July 30, the Goship-Shoshones October 12, and the mixed bands of Bannocks and Shoshonees October 14, 1863, the Senate added the following amendment:

> Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.

18. The treaty with the plaintiff bands as amended was ratified March 7, 1864. The amended treaty was in due course submitted to plaintiff bands and was ratified and accepted by them November 18, 1864, and proclaimed by the President January 17, 1865. 13 Stat. 663–665.

19. With the exception of the mixed bands of Bannocks and Shoshones, all of the bands of Shoshone Indians above mentioned assented to and accepted the amendment of the Senate to their respective treaties (13 Stat. 663, 13 Stat. 681, 18 Stat. 685, 18 Stat. 689). The mixed bands of Bannocks and Shoshones, with whom the treaty of October 14, 1863, was made and subsequently ratified by the Senate with the amendment above-mentioned, were never assembled for the purpose of obtaining their formal assent, apparently for the reason that they became so scattered as to render it impossi-

ble to assemble them; the treaty was therefore never proclaimed by the President.

20. The treaty with the Western Band of Shoshones, dated October 1, 1863, came up for consideration in the Senate at the same time, i. e. March 7, 1864, as the other four treaties. The Senate first voted to ratify the Western Shoshone treaty with the same amendment that was made to the other four treaties but, in the same executive session on the same date, the Senate voted to reconsider its action with respect to this particular treaty. While the other four Shoshone treaties were ratified March 7, 1864, as hereinbefore mentioned, the Senate did not take final action on the Western Shoshone treaty until June 26, 1866, at which time this treaty was ratified without amendment except for the filling in of the blank space in Art. 3 as to the amount of the annuity to be paid under the treaty to those Indians.

21. Prior to and at the time of the making and the ratification of the treaty with plaintiff bands of the Shoshone Indians, the United States had not recognized and did not, at that time, recognize a right of exclusive use, occupancy, and possession in plaintiff bands as against the United States to any territory which was within the Mexican Cession and included in that described by Pocatello, and now claimed by plaintiff bands. The treaty of July 30, 1863, with plaintiff bands contained no express or implied stipulation of recognition or acknowledgment by the United States of any right, title, or interest in any land, and the United States, in making and ratifying the treaty, did not intend that it should be a stipulation of recognition and acknowledgment of any exclusive use and occupancy right or title of the Indians, parties thereto. On the contrary, the United States has ever exercised dominion and complete ownership over the territory and land for which plaintiff bands now seek to recover compensation. The treaty was intended to be, and was, a treaty of peace and amity with stipulated annuities for the purposes of accomplishing those objects and achieving that end.

22. Subsequently the following act of Congress was approved February 23, 1865; 13 Stat. 432:

> That the President of the United States be, and he is hereby, authorized, by and with the advice and con-

sent of the Senate, to enter into treaties with the various tribes of Indians of Utah Territory, upon such terms as may be deemed just to said Indians and beneficial to the government of the United States: *Provided*, That such treaties shall provide for the absolute surrender to the United States, by said Indians, of their possessory right to all the agricultural and mineral lands in said territory except such agricultural lands as by said treaties may be set apart for reservations for said Indians: *And Provided, Further*, That all such reservations shall be selected at points as remote as may be practicable from the present settlements in Utah Territory.

Sec. 2. *And be it further enacted*, That in agreeing with said Indians upon the amounts to be paid to them under the provisions of the treaties to be negotiated in pursuance of this act, care shall be taken to obtain from the Indians, to the greatest possible extent, their consent to receive for such payments agricultural implements, stock, and other useful articles, rather than money.

Sec. 3. *And be it further enacted*, That for the purpose of negotiating said treaties and carrying out the treaty provisions of this act, making presents to said Indians, and defraying the necessary expenses incident to such negotiation, there is hereby appropriated, out of any money in the treasury of the United States not otherwise appropriated, the sum of twenty-five thousand dollars.

23. No further treaty or agreement was ever negotiated, made, or attempted to be made, with the plaintiff bands of Shoshone Indians or any of the other bands of the Shoshone Nation, or tribe, other than the Eastern bands of the Shoshone Tribe with which a treaty was made July 3, 1868, and was ratified February 16, 1869, and proclaimed February 24, 1869, 15 Stat. 673; (*Shoshone Tribe of Indians of the Wind River Reservation in Wyoming* v. *United States*, 85 C. Cls. 331). In this treaty these Eastern bands relinquished all title, claim, or rights in or to any and all territory of the United States except a portion of country described therein containing 3,047,730 acres in the Wind River section of the present State of Wyoming which was set apart by this treaty of 1868 for their absolute and undisturbed use and occupancy and for such other friendly tribes or individual Indians as, from time to time, they might be willing with the consent of the United States to admit amongst them.

24. After the making of the treaty of July 30, 1863, the plaintiff bands became widely scattered over northern Utah and Nevada, and southern Idaho. In 1873 the Commissioner of Indian Affairs appointed a commission to investigate all tribes and bands in this region and to ascertain their number and the probability of gathering them upon one or more reservations where they could be more immediately under the care of the Government. The commission made an exhaustive investigation into the matters entrusted to it and reported that it had no trustworthy information as to the number of bands of the Northwestern Shoshone Indians. The commission further reported that a part of the Northwestern Shoshones under Pocatello (who signed the treaty of July 30, 1863) had already gone to the Fort Hall (Idaho) Reservation in southeast Idaho, and that Chief Tav-i-wunshea, with his small band, had gone to the Wind River (Wyoming) Reservation created and set apart under the treaty with the Eastern Shoshones in 1868. Toomontso (who had signed the Northwestern Treaty of July 30) and his band at about this time took up their abode on the Fort Hall Indian Reservation and an indefinite number of Indians of this band had gone to the Wind River Reservation. Eventually the remnants of the bands of Indians under San Pitz (a signer of the Northwestern Shoshone treaty of July 30), and Saigwits, also a party to the treaty, were induced by the commission to remove to the Fort Hall Indian Reservation, thus making a total of 400 Northwestern Shoshone Indians on the Fort Hall Reservation. The commission further reported that a careful enumeration disclosed that there were 400 Northwestern Shoshone Indians in southern Idaho. In 1873 a number of Northwestern Shoshone Indians had gathered in northeastern Nevada and were assigned by the Indian Agent in Nevada to a small area in that section as a home. On May 10, 1877, this tract, by order of the President, was withdrawn from sale or settlement and set apart as a reservation for the Northwestern Shoshone Indians. However, in 1879, all the Indians thereon, numbering about 300, were removed to the Western Shoshone Indian Reservation known as the Duck Valley Indian Reservation in southwestern Idaho and northern Nevada.

25. Art. 3 of the treaty of July 30, 1863, with plaintiff bands stated:

> In consideration of the stipulations in the preceding articles, the United States agree to increase the annuity [$10,000] to the Shoshonee Nation five thousand dollars, to be paid in the manner provided in said treaty. * * *.

Following the final ratification of this treaty with plaintiff bands, there was appropriated by Congress for the "Northwestern Bands of Shoshones" annually for twenty years the sum of $5,000, as stipulated in the treaty of July 30, 1863, with plaintiffs. The total so appropriated for the years 1865 to 1884, inclusive, for plaintiff bands was $100,000. The sums so appropriated, together with the sums appropriated for the Western bands and the Shoshonee-Goship bands of the Shoshone Tribe, were carried on the books of the Treasury under the heading "Fulfilling treaty with Shoshones." In the Indian Office, however, the sums appropriated for the "Northwestern Bands of Shoshones" for the first 18 instalments were carried on subsidiary ledgers under the heading "Fulfilling treaty with Shoshones, Northwestern Bands." Of the sum of $90,000 appropriated for the first 18 instalments and credited to this fund on the ledgers of the Indian Office, a total of $77,195.83 was expended for annuity goods for plaintiff bands leaving a deficiency of $12,804.17. However, the amount of $2,000 of this deficiency was subsequently recovered from Agent How and credited to the fund "Fulfilling treaty with Shoshones," which was a fund applicable to the fulfillment of the treaty stipulations with plaintiff bands and other bands of the Shoshones.

The last two treaty appropriations for the fiscal years 1883 and 1884 of $5,000 each for plaintiff bands, $5,000 each for the Western bands, and $1,000 each for the Goship bands, totaling $22,000, were carried under the control appropriation "Fulfilling treaty with Shoshones." No attempt was made by the Government's accounting officers to apportion the expenditures out of this fund among these bands, which appears to have been due to the fact that by this time the identity of the Shoshone Indians which had been known as the "Northwestern Bands" upon the Western Shoshone Res-

ervation and other reservations, as hereinbefore mentioned, had been practically lost. This fund of $22,000 was supplemented by various amounts aggregating $3,861.78, in which amount was included the sum of $67.50, being an unexpended balance from the fund "Fulfilling treaty with Shoshones, Northwestern Bands," and the $2,000 recovered from Indian Agent How from advances made to him, making a total of $25,861.78 available under the appropriations and in the accounts of the Government for disbursement pursuant to the treaties with the Northwestern, Western, and Goship-Shoshone bands of the Shoshone Tribe of Indians. A total of $25,728.67 was disbursed out of this fund for treaty goods at the Western Shoshone Agency in Nevada under the appropriation "Fulfilling treaty with Shoshones" without distinction or segregation of the accounting records as to the amounts of money disbursed for goods for each group of the Northwestern, Western, or Shoshone-Goship Indians. The treaty goods and provisions purchased with the money appropriated for each group of bands were disbursed to the Indians of the bands entitled thereto. The full amount of annuity appropriations for these bands of Shoshones was exhausted in 1894.

The deficiency in the disbursement of annuity appropriations for treaty goods and provisions due plaintiff bands from the total of $100,000 appropriated by Congress for this purpose is $10,804.17.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff bands of Shoshone Indians are not entitled to recover under the treaty of July 30, 1863, as for a taking by the United States of any portion of the 15,643,000 acres of land for which compensation is herein claimed.

The court further concludes as a matter of law that plaintiff bands are entitled under Art. 3 of the treaty of July 30, 1863, to recover ten thousand eight hundred four dollars and seventeen cents ($10,804.17) subject to deduction of offsets, if any, under the terms of section 3 of the Jurisdic-

tional Act, which offsets, if any, are reserved for determination as provided in Rule 39 (a).

OPINION

LITTLETON, *Judge*, delivered the opinion of the court:

Section 1 of the Jurisdictional Act (45 Stat. 1407) provides as follows:

> That jurisdiction be, and hereby is, conferred upon the Court of Claims, notwithstanding lapse of time or statutes of limitations, to hear, adjudicate, and render judgment in any and all claims which the northwestern bands of Shoshone Indians may have against the United States arising under or growing out of the treaty of July 2, 1863 (18 Stat. 685, 2 Kappler 848); treaty of July 30, 1863 (13 Stat. 663, 2 Kappler 850); Act of Congress approved December 15, 1874 (18 Stat. 291), and any subsequent treaty Act of Congress, or Executive order, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

The treaty of July 2, 1863, mentioned above, was with the Eastern bands of the Shoshone Nation, and is set forth in finding 9. The treaty of July 30, 1863, was with plaintiff bands of the Shoshone Nation, and is set forth in finding 10. The act of Congress approved December 15, 1874 (18 Stat. 291, 292), was an act ratifying an agreement of September 26, 1872, with the Eastern bands of the Shoshone Indians ceding to the United States a portion of a reservation in the Wind River Valley of Wyoming set apart for the exclusive use and occupancy of said Eastern bands by the treaty with them of July 3, 1868. The plaintiff bands were not parties to the treaty of 1868 or the agreement of 1872. See 85 C. Cls. 331. The act of December 15, 1874, had no reference to the treaty of July 30, 1863, with plaintiff bands and did not affect that treaty, or any of the territory claimed in this proceeding. There were no treaties or acts of Congress subsequent to the treaty with plaintiff bands of July 30, 1863, other than the act of February 23, 1865, 13 Stat. 432, set forth in finding 22, which made reference to any part of the territory in which was located any of the land for which plaintiff bands herein make claim for compensation.

In order to recover in this case, plaintiff bands must show that in the treaty with them of July 30, 1863, or in the treaty of July 2, 1863, with the Eastern Bands of the Shoshone Nation, which was made a part of the treaty with plaintiff bands, the United States, acting through the appropriate officials of the Department of Indian Affairs, the treaty commissioners, who negotiated and made the treaty with these bands, the President, and the Senate expressly or by necessary implication recognized, acknowledged, and conceded under the terms of these treaties the exclusive possessory use and occupancy right or title of plaintiff bands of the Shoshone Indians as against the United States in the whole or some part of the territory of 15,643,000 acres of land for which they now make claim for compensation as for a taking in violation of that treaty of July 30, 1863.

The question whether under the Mexican laws at the time of the Mexican Cession of 1848 plaintiff bands had use and occupancy rights—that is, "Indian title"—to certain of the land involved in this case based upon aboriginal possession or occupancy to the exclusion of other Indian tribes has been decided adversely to the defendant's contention in this case in *United States of America, as Guardian of the Indians of the Tribe of Hualpai in the State of Arizona* v. *Santa Fe Pacific Railroad Co.*, 314 U. S. —, decided December 8, 1941. That was a suit by the United States, as guardian of the Hualpai (Walapais) Indians, for an accounting by the Railroad Company for all rents, issues and profits derived from the leasing, renting, or use of the lands subject to right of occupancy by the Indians, and the court said:

> Basic to the present causes of action is the theory that the lands in question were the ancestral home of the Walapais, that such occupancy constituted "Indian title" within the meaning of section 2 of the 1866 Act, which the United States agreed to extinguish, and that in absence of such extinguishment the grant to the railroad "conveyed the fee subject to this right of occupancy." *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 66. * * *
>
> Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any

other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had "Indian title" which unless extinguished survived the railroad grant of 1866. *Buttz* v. *Northern Pacific Railroad*, *supra*.

"Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." *Cramer* v. *United States*, 261 U. S. 219, 227. * * * Whatever may have been the rights of the Walapais under Spanish law, the *Cramer* case assumed that lands within the Mexican Cession were not excepted from the policy to respect Indian right of occupancy. * * *

Plaintiff bands contend that in their treaty of 1863 the United States recognized, acknowledged, and conceded their aboriginal use and occupancy right or title to the territory within and without the Mexican Cession and that no action of the United States has ever extinguished this occupancy right or title.

The defendant contends that there was no such acknowledgement in this treaty by the United States of the exclusive use and occupancy title of plaintiff bands to any portion of the lands claimed by them as against the Government, but that the treaty was intended to be, and was, a treaty of peace and amity with stipulations for annuities in goods and provisions for the Indians, parties to the treaties, in return for such peace and amity by the ending of attacks upon settlers and depredations committed in the territory inhabited and roamed over by them, and upon the white emigrants passing through such country on the overland trails to California, Oregon, and the mining regions of Idaho and Montana.

We are of opinion from a careful consideration of the treaties of July 2 and July 30, 1863, in the light of the facts and circumstances disclosed by the record and the history of the times before and after the treaties with plaintiff bands and other bands of the Shoshone nation or tribe of Indians, that the defendant's contentions are correct and

that the United States did not in the treaty with plaintiff bands recognize or acknowledge the use and occupancy right or title in plaintiff bands as against the Government to the whole or any portion of the territory now claimed by them. On the contrary, the record compels the conclusion that the United States has ever exercised dominion and complete ownership over the territory for which plaintiff bands now make claim. No subsequent treaty or agreement was ever made with plaintiff bands.

At the outset it should be stated that the fact that plaintiff bands may have inhabited, claimed, possessed, and occupied the whole or a part of the territory of 15,643,000 acres of land now claimed by them to the exclusion of other tribes of Indians, and with the recognition of the other tribes, would not entitle plaintiff bands here successfully to maintain the claim involved in this suit or authorize the court to enter judgment thereon based on immemorial or aboriginal possession and occupancy. *Hayt, Administrator,* v. *United States*, 38 C. Cls. 455, 462; *Duwamish et al. Tribes of Indians* v. *United States*, 79 C. Cls. 530, 599, 600. Cf. *Coos Bay Indian Tribes et al.* v. *United States*, 87 C. Cls. 143; *The Wichita and Affiliated Bands of Indians in Oklahoma et al.* v. *United States*, 89 C. Cls. 378, 420. The jurisdictional act does not embrace such a claim independent of the treaty of July 30, 1863; therefore, unless the defendant by this treaty recognized and acknowledged that the plaintiff bands had exclusive possessory use and occupancy title, they are not entitled to recover as for a taking by the United States. The fact that the treaties of July 2 with the Eastern bands and of July 30 with plaintiff bands did not contain any express provision or language with reference to the matter of extinguishment of any claim, right, title, or interest of the Indians in respect of the territory inhabited by them does not establish that, by the treaty, the United States recognized and acknowledged the existence of such right or title as against its own title. Without doubt the United States had the unquestioned right to exercise complete dominion and ownership of the territory in which plaintiff bands were found in and prior to 1863. In *United States of America, as Guardian, etc.*, v. *Santa Fe Pacific Rail-*

road Co., supra, the court in referring to rights and title of Indian tribes based on aboriginal possession, use, and occupancy said—

> Nor is it true, as respondent [Railroad] urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the *Cramer* case, "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive." 261 U. S. at 229.

In speaking with reference to the matter of extinguishment of Indian title, the court further said:

> Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method, and time of such extinguishment raise political, not justiciable issues. *Buttz* v. *Northern Pacific Railroad*, *supra*, p. 66. As stated by Chief Justice Marshall in *Johnson* v. *M'Intosh*, *supra*, p. 586, "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. *Beecher* v. *Wetherby*, 95 U. S. 517, 525.

In and prior to 1850 the Government had practically no knowledge with reference to the Indians inhabiting the country which became southern Idaho, eastern Oregon, northern Nevada, and northern Utah or of any particular areas occupied by any particular tribes or bands, and knew very little as to tribal distinctions. From 1849 until 1863, when the five treaties mentioned in the findings were made with the different bands of Indians of the Shoshone nation or tribe, and subsequently, the Government Indian agents and superintendents of Indian Affairs in Washington and Utah territories, in which the States of Idaho, Nevada, Utah, and Wyoming now are located, acquired in their travels and contacts with the Indians some information as to the locations of various bands of these Indians and the area in which they lived and over which they roamed and hunted, but such information was general in character and indefinite as to boundaries of specific areas and, also, as to specific

bands or individual Indians of specific tribes. The Utah Superintendency of the Indian Department was located at Salt Lake and the agents and representatives of the Government at this superintendency made various trips among the Indians in that territory and westward, across what is now Nevada, in the vicinity of white settlements and along the overland trails to California, Oregon, and Idaho. The overland trail to California passed through the territory then occupied by the Eastern bands of Shoshones in what is now the southwestern portion of Wyoming and the northeast corner of Utah, through the territory occupied by plaintiff bands in what is now northeast Utah and southeast Idaho, through the territory occupied by the bands of Bannocks and Shoshones in northeast Idaho, the Goship-Shoshone bands in western Utah below Salt Lake, and the Western bands of the Shoshones in northeast Nevada. The main California trail came through southwest Wyoming over the mountains into northeast Utah north of Great Salt Lake and across that portion of Utah to Nevada and south, in Nevada, to the Humboldt River and along that river westward across that state to California.

The Shoshone Tribe of Indians and the various bands thereof, with a few exceptions hereinafter mentioned, desired to be and were peaceful and friendly to the whites and the Government. The Shoshone nation, or tribe, as such, has never made war upon the United States or the white settlers. The bands of Shoshone Indians inhabiting the territory which became northern and western Utah, southern Idaho and northeastern Nevada were poor; the territory in which they lived was mostly desert country, and there was only a sparse supply of game and food. The white emigrants and settlers during the period from 1849 to 1863 practically destroyed the source of livelihood of the Shoshone Band of Indians in this territory. The result of this was that a number of Indians of the Northwestern Bands, and perhaps some of the other bands, made attacks upon the white settlers and emigrants and committed depredations from time to time up to January 1863. The record shows that the Indian agents and some of the military representatives of the Government traveling through a portion

of the territory in which these Indians were found gave the various Indians, as far as they were able so to do, some provisions and supplies as presents for the purpose of endeavoring to end these attacks and depredations. The agents found that all the Indians desired peace but they were strong in their protestations of the destruction of their means of livelihood and begged the Government agents to bring them presents and provisions. The agents found and from time to time reported to the Commissioner of Indian Affairs, and the Commissioner of Indian Affairs reported to Congress in his annual reports that these Indians were practically in a starving condition by reason of destruction of their source of food and that they were desirous of peace; that the attacks and depredations were doubtless being committed because of their condition and because they deemed it necessary to "steal or starve." The record also shows that the acts and conduct of certain unscrupulous whites also contributed to depredations by some of the Indians.

The Secretary of Interior and the Commissioner of Indian Affairs constantly recommended to Congress that some provision be made for assistance to and care of these Indians and that an appropriation be made and authority granted to negotiate treaties with them with a view to bringing about a permanent peace. It was not, however, until the enactment of a provision in the Appropriation Act of July 5, 1862, 12 Stat. 512, 529, that Congress made any appropriation for the assistance of these Indians or authorized the negotiation of a treaty with them. In that act Congress appropriated $20,000 "for defraying the expenses of negotiating a treaty with the Shoshonees or Snake Indians, * * *, to be expended under the direction of the Secretary of the Interior." The Secretary of the Interior had asked for $45,000, but Congress evidently thought that $20,000 would be sufficient to secure a treaty of peace. (See finding 4.)

Treaty commissioners were duly appointed and given instructions as set forth in finding 5. There was delay on the part of the commissioners in communicating to the Indians the intention of the Government to negotiate with them for peace and for payment of annuities, with the result

that the attacks and depredations continued. Early in January 1863 the military authorities in the District of Utah learned of the encampment on Bear River, in the southeast corner of Idaho, of a large body of Indians from the Northwestern Bands and attacked this group of Indians in force and killed 224 of them. Thereafter, on or before June 1, 1863, the treaty commissioners, the chairman of which group was James Duane Doty, then superintendent of Indian Affairs for the Territory of Utah, began their work of negotiating with the Indians. The commissioners concluded that it would be best to meet and negotiate with the various bands of the Shoshone tribe in groups at different points for the reason that "The Shoshone bands are scattered over so vast an extent of country that it will be necessary for the commissioners to meet them at several points. The whole nation can never be assembled without bringing them hundreds of miles." Most of the bands of this tribe, other than the Eastern bands, were without horses or other means of transportation. After the making of these treaties and the furnishing of annuities in goods and provisions, the Indians remained peaceful and did not cause the United States or the white settlers any serious trouble.

The territory ceded to the United States by Mexico February 2, 1848, under the treaty of Guadalupe Hidalgo, 9 Stat. 922, 929, added to the United States the area of what is now California, Nevada, Utah, Arizona, New Mexico, and a part of Colorado. Of the total of 15,643,000 acres of land claimed by plaintiff bands in this proceeding, 9,576,000 acres are located in Utah and Nevada within the Mexican Cession; the balance, or 6,067,000 acres, is located in southeast Idaho. Of the 25,197,000 acres described by the Eastern Bands of Shoshone Indians in the treaty with them of July 2, 1863, 7,552,000 acres are located in what is now northwest Colorado and northeast Utah, within the Mexican Cession, and the balance of 17,644,000 acres is located in what is now Wyoming and Idaho. All of the territory inhabited and described by the Goship-Shoshone Bands of Indians in the treaty with them of October 12, 1863, was located within the Mexican Cession, as was all the territory inhabited and described by the Western Bands of

Shoshones in their treaty of October 1, 1863. All the territory which the treaty commissioners indicated as being inhabited by the Mixed Bands of Bannocks and Shoshones was entirely within what is now northeast Idaho and western Wyoming, no part of which is in the territory of the Mexican Cession.

In the Act of September 30, 1850 (9 Stat. 544, 558), Congress made an appropriation of $20,000 "to enable the President to hold treaties with the various Indian tribes in the State of California." (Cf. Act of June 5, 1850, 9 Stat. 437, and page 555, paragraph 12, of the Act of September 30, 1850, *supra.*)

Eighteen separate treaties were negotiated between March 19, 1851, and January 7, 1852, with some of the tribes and bands of Indians in California. These treaties with the Indians of California were submitted to the Senate by the President on June 1, 1852, for action, and on July 8, 1852, the Senate by unanimous vote adopted a resolution on each treaty refusing to give its consent thereto. This action of the Senate was due to the fact that at that time it did not desire to recognize in the Indians any possessory use or occupancy right, title or interest as against the United States to any specific lands for the reason that the United States in acquiring the territory from Mexico succeeded to all rights in the soil, possessory and otherwise, and the Government regarded itself as the absolute and unqualified owner; that since the Indians had no possessory, occupancy, or other rights therein which were to be in any manner respected, the United States was under no obligation to treat with the Indians occupying the same for the extinguishment of their title. The Executive Department and the Senate had that policy or attitude in mind in 1863 and 1864 when the treaty with plaintiff bands of the Shoshone Indians was negotiated, made, and ratified with the amendments hereinafter mentioned.

The treaty of July 30, 1863, with plaintiff bands and the treaty of July 2, 1863, with the Eastern Bands of the Shoshone Nation (findings 9 and 10) were ratified with the following amendment added by the Senate:

> Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the

lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.

All the remaining treaties with the various bands of the Shoshone Tribe of Indians were ratified with like amendment March 7, 1864; however, action on the treaty with the Western Band of Shoshone Indians was reconsidered by the Senate on the same day and final action thereon was taken on June 26, 1866, more than two years later, when the same was ratified without amendment, other than the filling in of the blank space therein as to the amount of the annuity of $5,000 per annum for twenty years. Why the amendment above quoted, which was added to the other treaties, was first added to the Western Shoshone treaty but finally left out when the treaty was subsequently ratified does not appear; but we think that has no important bearing upon the question of rights of plaintiff bands under their treaty. A subsequent change of attitude or policy toward these Indians would not, without more, constitute a recognition or acknowledgment of title by a prior treaty which did not disclose such an acknowledgment. In view of the position thus taken by the United States, we think it cannot be said that the treaty with plaintiff bands recognized and acknowledged any right, title, or interest in them to the territory which they may have occupied or to which they now make claim. Although the plaintiff bands, insofar as other tribes were concerned, may have exclusively occupied and used all or a portion of the territory involved in their present claim as their aboriginal home (and the record is sufficient to show that they did), they are not entitled to recover for the reason that the jurisdictional act only authorizes this court to consider, adjudicate, and render judgment on a claim "arising under or growing out of the treaty" with them. Such a claim must be one that is within the terms of and supported by the provisions of the treaty. Aboriginal occupancy and use is not such a claim. The record shows and we have found as a fact that the United States has never recognized, either at the time the treaty of July 30 was made, or subsequently, a right of exclusive occupancy in plaintiff bands to the territory claimed

by them but that it has ever exercised complete dominion over the territory, and this is one method, or manner, so far as the present authority of the court to adjudicate is concerned, of extinguishing Indian title. *United States* v. *Santa Fe Pacific R. R. Co., supra.*

Moreover, in addition to what has hereinabove been said, the facts disclosed by the official records and communications of the Government show that it was not the intention of the Executive Department of the Government at the time of making the treaties with the Shoshone Indians in 1863 to stipulate and agree in such treaties either in favor of or against any use or occupancy claim of the Indians. The treaties were intended to be, and we think they are, treaties of peace and amity because the Government had very little reliable information as to the territory actually occupied by these Indians. The treaty commissioners were therefore given specific instructions, among others, not to undertake negotiations with the view to extinguishment of any Indian title to land. We think the effect of these instructions, together with others which followed (finding 6), was that the treaty commissioners were not to stipulate with reference to the recognition and acknowledgment on the part of the Government of any exclusive use and occupancy title of the Indians to the land. Judging by what was done, we think the treaty commissioners so understood their instructions. The commissioners therefore simply wrote into the various treaties the statements made by different groups or bands as to the "country described" or "claimed" by them, which descriptions by the Indians were very general and rather indefinite. Especially was this true in connection with the treaty of July 30 with plaintiff bands. In this treaty Chief Pocatello, of one of the bands, mentioned only the Raft River and the Porteneuf Mountains in describing the territory "claimed for himself and his people," and nothing was said with reference to the northern or southern boundaries and nothing whatever with reference to an additional territory of 6,255,000 acres of land now claimed by plaintiff bands lying wholly west of Raft River. Art. 4 of the treaty with plaintiff bands therefore simply stated: "The country claimed by Pokatello, for himself and his people, is bounded on the west by Raft River and on the

east by the Porteneuf Mountains." The purpose of obtaining a description of territory from the Indians was, as the letter of instructions of July 22, 1862, stated, to obtain as much information as possible as to what territory the Indians *claimed*, because the Government had no information in that regard from the Indians themselves, and very indefinite information otherwise as to the territory which they occupied.

We do not think the amendment added by the Senate constituted a recognition and acknowledgment of exclusive use and occupancy right or title by the Indians. That amendment did not have any relation to any territory not within the Mexican Cession. As to such territory mentioned in the treaty as fell within the Mexican Cession, the amendment was simply a limitation on the right or title of the Indians based on aboriginal occupancy, if, as a matter of law, there was such a limitation under Mexican law in 1848. Without the amendment the treaty did not admit or deny aboriginal occupancy, nor did it acknowledge the right of exclusive use and occupancy as against the United States. The amendment therefore added nothing to the treaty in this respect.

In 1939 the General Land Office prepared a map based on more accurate information which followed the general outlines roughly indicated by Commissioner Doty on the map (finding 14) which accompanied the treaties and this 1939 map also showed the boundaries to the extent mentioned in the various treaties. After indicating the exterior boundaries within the general outlines shown on the Doty map, the Government computed the acreage therein. The entire area embraced within the general exterior lines shown on the Doty map which accompanied the treaty, as corrected and computed on the 1939 map, comprised 80,825,000 acres of land. The entire population of the Shoshone tribe and affiliated Bannock bands of Indians in 1863 was between 9,000 and 10,000; the population of the Eastern bands was about 4,500; that of the Northwestern Bands, about 1,800; that of the Western bands, about 2,000; and that of the Goship-Shoshone Bands, about 1,000. The number of Bannocks, or the Mixed Bands of Bannocks and Shoshones not

included in the above-mentioned population of the Eastern Bands, was about 400. No census was taken by the agents of the Government; these figures as to population are approximate.

Upon the whole record we are of opinion that plaintiff bands are not entitled to recover under the treaty of July 30, 1863, as for a taking by the United States of any land for the reason that the defendant did not, in the treaty, set aside any specific area for the exclusive use and occupancy by plaintiffs, and did not, by the treaty, recognize or acknowledge any exclusive use and occupancy right and title of the Indians to the whole or any portion of the acreage here claimed. In reaching this conclusion we have not departed from the rules to be followed in the interpretation of treaties with the Indians, as set forth in *Jones* v. *Meehan*, 175 U. S. 1; *United States* v. *Winans*, 198 U. S. 371; *Choctaw Nation* v. *United States*, 119 U. S. 1, 21; *Choctaw Nation* v. *United States*, 179 U. S. 494, 531–534; *Carpenter et al.* v. *Shaw*, 280 U. S. 363, 365; *Blackfeet et al. Tribe* v. *United States*, 81 C. Cls. 101.

Plaintiff bands claim that the defendant failed to fulfill the promises which it made in the treaty with reference to the annuity of $5,000 per annum for twenty years, totaling $100,000. This entire amount was appropriated by Congress in twenty annual instalments and the record satisfactorily shows that the total of the amount so appropriated except $10,804.17 was expended and disbursed by the Government in goods and provisions for the Indians of the Northwestern Bands. How and why the deficiency of $10,804.17 in the annuity goods due the Indians of the Northwestern Bands came about does not appear and the Government records do not disclose what became of this sum. After the treaty of July 30 with plaintiff Indians, band affiliations became practically lost. Some of these Indians went to the Wind River Reservation with the Eastern Band of Shoshones, some to the Fort Hall Indian Reservation in Idaho, some to the Western Shoshone or Duck Valley Indian Reservation in southwestern Idaho and northern Nevada, and an indefinite number of individual Indians of the Northwestern Bands continued to roam and live in northern Utah and southern Idaho and worked at times for white settlers.

Whether this balance of $10,804.17 was not expended and disbursed in annuity goods for the Northwest Shoshone Indians because they were so scattered or whether the appropriation lapsed and the fund reverted to the Treasury does not appear. Plaintiff bands have submitted no proof to show that the defendant took this money for its own use or took it from plaintiff bands and gave or expended it for Indians other than the Indians of the Northwestern Bands.

Plaintiff bands are entitled to recover this sum of $10,804.17 to the extent that it may exceed any allowable offsets to which the defendant may show itself entitled under section 3 of the Jurisdictional Act on further proceedings under Rule 39(a). But plaintiff bands are not entitled to recover interest on this deficiency in the treaty annuities from the years in which the last two of the twenty annuity instalments were due, for the reason that the record does not establish that this money was taken by the United States under such circumstances as would entitle the plaintiff bands to interest as a part of just compensation. *The Choctaw Nation* v. *United States*, 91 C. Cls. 320, 402, 403.

The claim of plaintiffs for compensation as for a taking by the defendant of lands is dismissed, and an interlocutory order under Rule 39(a) is hereby entered reserving the determination of the amount of recovery, if any, in respect of the amount of $10,804.17 after determination of the amount of offsets, if any, for further proceedings. It is so ordered.

MADDEN, *Judge*; JONES, *Judge*; WHITAKER, *Judge*; and WHALEY, *Chief Justice*, concur.

A true copy.
Test:

Chief Clerk, Court of Claims of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1942

[fols. 89-90] JUDGMENT OF THE COURT UNDER RULE 39(a)—March 2, 1942

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff bands of Shoshone Indians are not entitled to recover under the treaty of July 30, 1863, as for a taking by the United States of any portion of the 15,643,000 acres of land for which compensation is herein claimed.

The court further concludes as a matter of law that plaintiff bands are entitled under Art. 3 of the treaty of July 30, 1863, to recover ten thousand eight hundred four dollars and seventeen cents ($10,804.17) subject to deduction of offsets, if any, under the terms of section 3 of the Jurisdictional Act, which offsets, if any, are reserved for determination as provided in Rule 39 (a).

[fols. 91-92] FINAL SUBMISSION OF CASE ON MERITS

On December 6, 1943, the case was submitted on merits, without argument, by Mr. Ernest L. Wilkinson for plaintiff, and by Mr. George T. Stormont for defendant.

[fol. 93] ADDITIONAL SPECIAL FINDINGS OF FACT, CONCLUSION OF LAW, AND OPINION BY LITTLETON, J.—Filed January 3, 1944.

Mr. Ernest L. Wilkinson and *Mr. Herman J. Galloway* for the plaintiffs.

Mr. Joseph Chez, Mr. Charles J. Kappler, Mr. Frank K. Nebeker, and *Mr. Clinton D. Vernon* were on the brief.

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Norman N. Littell,* for the defendant.

Mr. Raymond T. Nagle was on the brief.

This case is now before the court on accounting under Rule 39 for additional findings of fact and final judgment with reference to proper offsets, under the jurisdictional act, against plaintiff bands, with respect to the amount of $10,804.17 found by the court to be due plaintiffs in the findings of fact (finding 25) and opinion promulgated March 2, 1942.

Additional Special Findings of Fact

1. During the period from July 1, 1863, to June 30, 1878, the United States expended gratuitously out of its public funds for the use and benefit of the plaintiff bands the following specific sums for the following purposes as shown, among other expenditures, on page 44 of the accounting report of the Comptroller General filed as evidence herein.

Livestock	$525.00
Pay of Interpreters	64.40
Provisions and other rations	2,277.95
Transportation, etc., of supplies	6,614.12
	9,481.47

[fol. 94] During the period from July 1, 1863, to June 30, 1878, the United States expended gratuitously out of its public funds for the use and benefit of the plaintiff bands jointly with other Shoshones the following sums for the following purposes only, as shown on page 45 of the Comptroller General's accounting report filed as evidence herein:

Medical attention	$280.00
Provisions and other rations	601.34
Repairing guns	937.11
Transportation, etc., of supplies	851.56
	2,670.01

One-half of said sum of $2,670.01, to wit, $1,335.01, was expended for the benefit of the plaintiff bands.

2. The specific amounts of gratuitous expenditures made by defendant on behalf and for the benefit of the plaintiff bands as set forth in the preceding finding have been agreed upon and stipulated by the parties as proper offsets against the amount of $10,804.17 heretofore found by the court to be due plaintiff bands by defendant.

Conclusion of Law

Upon the foregoing additional findings of fact and the findings of fact made and promulgated March 2, 1942, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff bands are not entitled to

recover. It is, therefore, adjudged and ordered that the petition be dismissed.

OPINION

LITTLETON, JUDGE, delivered the opinion of the court.

Upon a stipulation of facts filed by the parties with reference to certain items of gratuitous expenditures by defendant on behalf of plaintiff bands, which expenditures are disclosed in an accounting report of the Comptroller General filed as evidence herein, the court has made additional findings with reference to offsets, as required by the jurisdictional act, to the extent necessary by reason of the finding and decision of March 2, 1942, that defendant owed plaintiff bands the sum of $10,804.17.

[fols. 95-96] The parties hereto stipulate and agree and the court now holds that in the event of further litigation between the parties, either in this suit or under the present or a similar jurisdictional act, the finding of the specific amounts of offsets herein, totaling $10,816.48, shall not operate for or against the assertion by defendant, as proper offsets against any judgment recovered by plaintiff bands, of other items of disbursement, including expenditures of the same kind or quality as those set forth in the finding herein, made by defendant for the benefit of the plaintiff bands.

The total of the specific offsets found herein to be proper offsets under the terms of the jurisdictional act exceed the amount which the court has found to be due plaintiff bands by defendant. Plaintiffs are, therefore, not entitled to a judgment against the defendant and the petition is dismissed. It is so ordered.

Madden, Judge; Whitaker, Judge; and Whaley, Chief Justice, concur.

Jones, Judge, took no part in the decision in this case:

[fols. 97-98] FINAL JUDGMENT OF THE COURT—January 3, 1944

Upon the additional findings of fact and the findings of fact made and promulgated March 2, 1942, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff bands are not entitled to recover.

It Is Therefore Adjudged And Ordered that the petition be and the same is hereby dismissed.

[fols. 99-100] PROCEEDINGS AFTER JUDGMENT

On March 25, 1944, the plaintiff filed a motion for an extension of time to April 14, 1944, to file a request for record in re certiorari together with parts of the record so requested and a petition for Writ of Certiorari, and said motion was allowed by the court on the same day.

On April 8, 1944, the plaintiff filed a request for record in re certiorari together with parts of the record so requested and a petition for writ of certiorari, as follows:

[fols. 101-102] PLAINTIFF'S APPLICATION FOR TRANSCRIPT OF RECORD—Filed April 8, 1944

To the Clerk of the United States Court of Claims:

The Northwestern Bands of Shoshone Indians, the plaintiffs above named, intend without unnecessary delay to file a petition to the Supreme Court of the United States for a writ of certiorari in the above-entitled case.

Plaintiffs hereby apply for a certified transcript of the record in said case, consisting of the following:

1. The pleadings.

2. Findings of fact, conclusion of law, judgment and opinion of the Court dated March 2, 1942.

3. Findings of fact, conclusion of law, judgment and opinion of the Court dated January 3, 1944.

4. The following documentary evidence, copies of which (except as to physical exhibits) are furnished herewith:

(a) Report of the Department of the Interior in form of a letter dated March 3, 1934, from Oscar L. Chapman, As-
[fols. 103-104] sistant Secretary, to the Attorney General, filed December 10, 1934 (without attached letters).

(b) Motion for call upon the Secretary of the Interior filed October 11, 1935, allowed October 24, 1935, and the reply thereto of the Secretary of the Interior dated April 29, 1936, and filed May 1, 1936, and letter attached thereto from the Assistant Commissioner of the General Land Office to the Commissioner of Indian Affairs dated January 24, 1936.

(c) Supplemental report of the Assistant Secretary of the Department of the Interior dated April 22, 1938, filed May 29, 1939 (without exhibits).

(d) Motion for call on the Department of the Interior filed July 24, 1939, allowed July 27, 1939, and reply of the

Department of the Interior dated September 16, 1939, and filed September 18, 1939.

(e) Map transmitted by the Secretary of the Interior with the report of the Secretary of the Interior filed May 1, 1936, set forth in paragraph 4 (b), above.

[105-106] (f) Map transmitted by the Secretary of the Interior with the Report of the Secretary of the Interior filed September 18, 1939, set forth in paragraph 4 (d) above.

(g) Map marked Plaintiffs' Exhibit No. 5 filed in open court March 4, 1941.

(h) Plaintiffs' Exhibit No. 4 filed in open court March 4, 1941, objected to by defendant.

Plaintiffs request that items (e) to (h) inclusive, above, be transmitted by the Clerk of this Court to the Clerk of the Supreme Court of the United States as physical exhibits. When completed and certified, it is requested that the remaining portions of the transcript of record be sent to the undersigned, attorney for the plaintiffs above named.

(sgd) Ernest L. Wilkinson, Attorney of Record.

[fols. 107-108] ORDER SETTLING AND APPROVING TRANSCRIPT OF RECORD ON PETITION FOR CERTIORARI—April 13, 1944

Plaintiffs, by their counsel, have filed an application for transcript of the record to accompany their petition for certiorari in which they request that there be included in the transcript, in addition to the pleadings, the findings of facts, conclusions of law, judgments, and opinions of the Court of March 2, 1942, and January 3, 1944, certain documents set forth and described in paragraph 4 (a) to (h), inclusive, of the application for transcript. The defendant offers no objection to the transcript including the documentary portions of the record requested in paragraphs 1 to 4 (g), inclusive. Defendant objects to the inclusion in the approved transcript of the record, as a part of the evidence in the case, of the documents requested in paragraph (h) of the application—that is, "plaintiffs' exhibit 4 filed in open Court March 4, 1941, objected to by the defendant."

Plaintiffs' exhibit 4 above-mentioned was not offered in evidence until after the requests for findings of facts and [fols. 109-110] briefs had been filed by the parties and the case had been called for argument before the Court for submission on March 4, 1941. Defendant had had no oppor-

tunity at the time the documents contained in plaintiffs' exhibit 4 were offered in evidence in open Court, as aforesaid, to fully examine the same or to meet and answer, by examination of witnesses or the offer of other evidence, any statements or alleged facts therein contained. For these reasons defendant objected to the receipt in evidence of the proffered exhibit 4.

Said exhibit 4, together with certain other documents consisting of maps not objected to, was permitted by the Court to be filed, subject to defendant's objection. No request was made by plaintiffs to have the case remanded to the General Docket for further proof. After submission of the case, and upon consideration thereof by the Court, defendant's objection to the receipt in evidence of plaintiffs' exhibit 4 under the circumstances was sustained by the Court. Plaintiffs were allowed an exception to this ruling of the Court.

[fols. 111-112] The transcript requested by plaintiff, having been considered and examined, is, this April 13, 1944, settled and approved as being those portions of the original record in this Court material to the errors assigned. The documents contained in "Plaintiffs' Exhibit 4" are included in the transcript under plaintiffs' exception to the ruling of the Court sustaining defendant's objection thereto.

The Clerk of this Court will transmit to the Clerk of the Supreme Court of the United States, as physical exhibits, the documents set forth and described in paragraphs 4 (a) to (h), inclusive, which are included in the approved transcript herein.

By the Court: Richard S. Whaley, Chief Justice.

[fol. 113] OTHER PORTIONS OF RECORD REFERRED TO IN ORDER SETTLING RECORD

Department of the Interior
Office of the Secretary
Washington

March 3, 1934.

The Honorable the Attorney General.

MY DEAR MR. ATTORNEY GENERAL:

Further reference is made to your communication of April 23, 1931, with which you transmitted a copy of Peti-

tion No. M-107, filed March 28, 1931, in the case of the Northwestern Band or Tribe of Shoshone Indians against the United States, in the United States Court of Claims.

Paragraph I of the petition divides the Shoshone Nation into three branches, known as the Eastern, the Western, and the Northwestern branches. The Eastern Shoshones occupy the Wind River Reservation in Wyoming. They have heretofore filed a suit in the United States Court of Claims, the petition in which is dated May 27, 1927, No. H-319, in said court, which case is now pending. The Western Shoshones have not filed a suit, for the reason that no jurisdictional act has been placed upon the statute books.

The Shoshonean family is described on page 555, Bulletin No. 30, Bureau of American Ethnology, No. 2, and the Shoshone proper is described on page 556 of the same volume. This description does not divide their lands among the bands, but it does give a general outline of their habitat, and shows that the Bannocks, also a member of the Shoshonean group, occupied a part, at least, of the country now claimed by the Northwestern Band of Shoshones. (For a description of the Bannocks and their habitat, see the above cited publication, Volume 1, page 129.) The classification of the Bannocks as Shoshones would account for their location on the Fort Hall Reservation in Idaho, mention of which is made in paragraph XI of the petition.

The Bruneau Shoshones, mentioned in paragraph I of the petition, are also shown on page 168 of the above publication as occupying part of the lands described in the petition as belonging to the Northwestern Band of Shoshones. The Boise Shoshones are not described but are mentioned in the synonymy of this publication, and given the name Wihinasht. The Panaiti Tribe is the same as the Bannock. [fol. 114] Paragraph II of the petition purports to quote the jurisdictional Act of February 28, 1929, which is published in Forty-five Statutes at Large at Page Fourteen Hundred and Seven.

Paragraph III of the petition introduces the petitioners, and shows the authority of the attorneys to represent the tribe.

Paragraph IV of the petition purports to describe, generally, the habitat of the entire Shoshone Nation in 1863, said to have been held by it, for its exclusive use and occupancy, except a small area around Great Salt Lake occupied by the Mormons as a refuge. The lands occupied by the

Mormons around the Great Salt Lake were preempted by them without first obtaining title from the Indians, and, later, apparently became a cause of dissatisfaction by the Indians. The domain of the Shoshone Indians, is shown under Nos. 444 and 520 on the maps in Royce's Land Cessions of the United States, of the States of Utah, Nevada, California, Oregon, Idaho, and Wyoming. The territory shown on the maps above referred to was recognized by the United States as belonging to the various bands of Shoshone Indians by the treaties of July 2, 1863 (18 Stat. L., 685), July 30, 1863 (13 Stat. L., 663), October 1, 1863 (18 Stat. L., 689), and July 3, 1868 (15 Stat. L., 673). The Bannocks were members of the Shoshone family, and joined the Eastern Shoshones in the treaty last above mentioned.

Paragraph V of the petition describes in detail all the lands as claimed by the Northwestern Band of Shoshones—

> * * * whose area extended from the aforesaid Bear River and Port Neuf Mountain country along the Snake River in the north and to the country of the Great Salt Lake on the south and westward to the mountains near the boundary between Utah and Nevada wherein lie the headwaters of the Raft River and Goose Creek, which flow in the Snake River, * * *

The area of the above described boundary has been computed by the General Land Office to be 8,683,622 acres. The explanation of that office of the method of computation is given as follows:

> The boundaries of the areas in question were laid down on maps of the several States published by the General Land Office on a scale of approximately 12 miles to the inch, in what is believed to be the most reasonable interpretation of the descriptions given, some of which are indefinite. The areas were then determined by the aid of planimeter readings. Although [fol.115] the figures given show significant digits in the units column, it should be remembered that these figures are based upon planimeter readings of areas with uncertain boundaries and should be considered only as approximations.

This paragraph also refers to the limited knowledge of the Government in 1855 and 1856 as to the population of Indian tribes in western Colorado and Wyoming, Utah, and

Idaho, and mentions the fact that the Shoshone Tribe was not even mentioned in the Commissioner's reports of 1855 and 1856.

The first census of these Indians taken with any degree of accuracy was in 1868, and is shown in report No. 28 of the Commissioner of Indian Affairs for 1868. It shows 2,000 Eastern Shoshones, 1,800 Northwestern Shoshones, and 2,000 Western Shoshones. The fact that the Shoshones were not mentioned in the reports for 1855 and 1856 should not be taken as evidence that the United States knew nothing about these Indians. They were known to be in southeastern Idaho before this date, and it was also known that they ranged in certain areas of country west of the Rocky Mountains and in the neighborhood of Great Salt Lake long before 1855. These Indians had been found in southern Idaho as early as 1830, although no census was ever taken of them until after treaties had been made and ratified.

Paragraph VI of the petition refers to the treatment of the Indians which caused their degredation and resultant attacks and depredations upon the whites.

The cause of strife with these Indians is shown in the report of the Commissioner of Indian Affairs for 1861, page 21, also reports Nos. 49, 50 and 53 of the Commissioner's reports for 1861. These reports are not being analyzed or discussed, but a reference thereto will show that it was not altogether the discovery of gold in Idaho and the influx of dissolute and reckless white men which caused the dissatisfaction of these Indians. While some of the Shoshones were induced to go upon the warpath, those Indians who were mainly the cause of the depredations through whiskey and white renegades appear to be the Utes of Utah. See report No. 41 of the Commissioner of Indian Affairs, September 16, 1862. The enclosures herewith also deal with one of the causes of strife between the Indians and the whites to which attention is invited. Another cause may be inferred from the fact that widely scattered Indian outbreaks about this time occurred, notably, by the Chippewa and Sioux of Minnesota, the Apaches and Navajoes of New Mexico and Arizona, and the Cheyenne and Arapaho Indians. Considerable unrest was also noted in the tribes in Washington, [fol. 116] Idaho, Utah, and other places, all of which would seem to indicate the possibility of a contemplated general Indian up-rising during the early part of the Civil War. All

three of the reasons above mentioned would, no doubt, account for the unrest and depredations of these Indians. (For an account of the Indian outbreaks see reports Nos. 42 and 44 of the Commissioner of Indian Affairs for 1862.)

Parargaph VII of the petition refers to the attitude of the Indians toward the Government and their defeat by the troops.

A rather full account of their attitude is given in the answer to Paragraph VI above and the references cited therein and the enclosures transmitted herewith.

Paragraph VIII of the petition quotes the three treaties of the three different divisions of the Shoshone Nation of Indians, those of July 2, July 30, and October 1, 1863, references to which are made in the answer to Paragraph IV above, and alleges that article 5 of the treaty of July 30, 1868, with the Northwestern Shoshones was added to the treaty by the Senate at the time of the ratification thereof. It is further alleged that the Indians consented to and ratified the amendment at the instance and request of the United States, even though the Indians had no knowledge as to Mexico "or the purpose or intent intended to be conveyed by said article 5."

In the case of the Otoe and Missouri Indians v. United States (52 Ct. Cls. 424), it was held, in effect, that the courts were not authorized to go behind the terms of the treaty in endeavoring to determine the understanding of either party thereto. This treaty was promulgated in January, 1865, being the first of the three treaties to become a valid document. Page 665 of the Thirteenth Statutes at Large, contains this certificate:

> Now, the said amendment having been, this 18th day of November, A. D. 1864, at a council held with the said chiefs and warriors at Box Elder, under the instructions of the President of the United States, submitted to the said chiefs and warriors for their consideration and acceptance, and the same having been read and fully interpreted to them in their own language, the said chiefs and warriors, for themselves and for the Shoshonee nation, do hereby agree and consent to the said amendment to the said treaty; and do stipulate that the same shall be and is hereby accepted and adopted as one of the articles thereof, and forever binding upon them and their said nation.

[fol. 117] In witness whereof the said Commissioner and the Superintendent of Indian Affairs in the Territory of Utah, on the part of the United States, and the said chiefs and warriors, on the part of the Shoshonee nation, have hereunto set their hands this eighteenth day of November, A. D. 1864.

James Duane Doty, Commissioner. O. H. Irish, Sup. Indn. Affairs. Pokatello, x his mark. Toomontso, x his mark. Sanpitz, x his mark. Tosowitz, x his mark. Tahkwetoonah, x his mark. Omashee (John), Pokatello's brother, x his mark.

The treaty commissioners and six chiefs and warriors of the tribe certified that the amendment was submitted to the chiefs and warriors for their consideration and acceptance and was read and fully interpreted to them "in their own language." Irrespective of the prior holding of the Court of Claims in connection with the interpretation of treaties, it would appear that the treaty itself declares that the amendment was fully interpreted to the Indians in their own language. They agreed to, ratified it, and it became a part of the treaty itself, even though it did not appear as article 5 in the document as originally drafted. Utah lies wholly within the Mexican cession to the United States in 1848.

This article is identical with article 7 of the treaty of July 2, 1863, proclaimed June 7, 1869. In fact, article 7, of the July 2 treaty appears to have been inserted in identically the same manner as article 5 of the July 30 treaty. This article nor no similar provision appears in the October 1 treaty proclaimed October 21, 1869. There has nothing been found in the records and files in this Department which would explain why this provision was inserted in two of these treaties but not in the other, but such reasons, either for its presence or absence in either instrument, appears to be immaterial. Further, there has nothing been found to indicate that the Indians did not fully understand the import of the article.

This paragraph of the petition refers further to the Goship treaty of October 12, 1863 (13 Stat. L., 681), probably for the purpose of closing the boundaries of the lands of the Shoshone Indians, and especially those of the Northwestern Band.

Paragraph IX of the petition describes the land alleged to have been held by the Northwestern Band of Shoshone Indians by actual exclusive use and occupancy, unquestioned by any other Indian tribe or by any civilized nation. [fol. 118] The paragraph further alleges that the United States recognized the land described as belonging to this band of Shoshones.

Three treaties were made with the three largest divisions of the Shoshone Nation, and one with the Goship or Goshute Band of Shoshones, as heretofore set out in the answer to Paragraph VIII of the petition. There is nothing in any individual treaty which would fully describe the land of any particular band, or, in fact, of the entire Nation. All four treaties must be read together to determine the extent of the entire national domain of these Indians and as described in the treaties. (See article 4 of the treaty of July 2, 1863, article 4, July 30, 1863, article 5, October 1, 1863, and article 5, October 12, 1863). We have been unable to locate anything in the records of this Department which would in any way tend to definitely and accurately identify the lands claimed by any particular band or division of this tribe or nation. The boundaries of the lands of the plaintiffs, as alleged, have been specifically set out in this paragraph of the petition, and the General Land Office has computed the area by the planimeter to be 11,574,374 acres.

This paragraph further alleges that the United States took possession of the lands of these Indians without a cession thereof to the Government and without the consent of the Indians being previously obtained, all of which is alleged to have been without authority of law.

Article 5 of the treaty of July 30, 1863, added by the Senate and ratified by the Indians, as heretofore stated, provided, in effect that the treaty should not be construed to admit any greater title in the Indians than that recognized as existing in them by Mexico. The policy of the Mexican Government in regard to Indian tribes is briefly outlined on pages 29 and 30 of the petition. The Indians, therefore, apparently had a bare right of occupancy defeasible by the United States without compensation other than the establishment of other homes for them. The new homes to be provided need not necessarily be established in the original domain of the Indians.

By Executive Order of February 12, 1875, the President

the exclusive use of mixed tribes of Shoshone, Bannock, and Sheepeater Indians". This reservation was estimated to contain approximately one hundred square miles, and was for any of the members of the three tribes mentioned irrespective of bands. Therefore, the United States appears to have followed the policy of Mexico, as provided by the treaty, and established a home for these Indians at Lemhi.

[fol. 119] Many of the Shoshone Indians of the Northwestern Band failed to take advantage of their right of removal, preferring to remain upon the lands near Salt Lake among the whites.

In Paragraph X of the petition an effort is made to separate the Bannock Tribe from the Shoshone Nation, and to show that they were forced by the press of immigration to abandon their lands in Montana and to occupy the lands of the Shoshones in southeastern Idaho.

Reference has been made heretofore in the answer to Paragraph I herein, to the Bannocks, and to the description of these people and their habitat, as outlined on pages 129 and 130, Part I, Bulletin No. 30, Bureau of Ethnology. It should be noted from this report that the Bannocks had been found in southeastern Idaho as early as 1829, and that Bonneville found them established on the Portneuf River just north of the Fort Hall Reservation in 1833. This bulletin classifies them as Shoshonean but more closely related to the Shoshones in western Nevada.

Reference is made in this report to the fact that these Indians claimed land in Montana, and cites the report of the Commissioner of Indian Affairs of 1869, page 289, as authority for the claim. This claim is also made in Paragraph X of the petition. A reference to the Commissioner's report of 1869 will show that the "Bannacks" are included in the report of Lieut. Col. Alfred Sully, Superintendent of Indian Affairs for Montana, dated September 23, 1869, at Helena, Montana, that part relating to the "Bannacks" being as follows:

> Are a very small tribe of Indians, not mustering over five hundred souls. They claim the southwestern portions of Montana as their land, containing some of the richest portions of the Territory, in which are situated Virginia City, Boseman City, and many other places of note. I believe it is the wish of the govern-

ment to place them on the reservation for the Snakes in Idaho, near Fort Hall. They do not, therefore, properly belong to my superintendency. They met me at Fort Ellis and begged me to allow them to accompany me to the Yellowstone country. They were in a deplorable condition, half starved, many of them without lodges, and what few they had were miserable cotton affairs, which could hardly stand the wind. They staid with me a few days on the Yellowstone, where they picked up amazingly on the game and fish that abound in that region. I gave them some flour and some powder and lead, and they started for the buffalo country, telling me they would overtake the Crows and hunt with them till winter. These Indians are quite intelligent, and many of them willing to work. They boast of the fact that not one of them ever shed the blood of a white man. They would be pleased to [fol. 120] be located on the reservation with the Crows. I spoke to them about their going to their reservation near Fort Hall, but they expressed the greatest aversion to that place; for what reason I could not learn. It is to be hoped that something will be done to assist them, for they are not only in need of it, but are deserving as any Indians we have in our country.

Attention is invited to the statement that these Indians "claim the southwestern portion of Montana as their land", and include the territory around Virginia City, Bozeman, and other portions in that locality.

Report No. 70 of the Commissioner of Indian Affairs, for 1869, states that the "Bannacks" always claimed the country around Fort Hall.

There is nothing to show when or why this small band of five hundred Bannocks went into Montana or how long they had been there. Virginia City and Bozeman are both located in the territory known as the common hunting ground of a number of tribes, and recognized as Blackfoot territory by the treaty of October 17, 1855 (11 Stat. L., 657). As they and the Blackfeet Indians were enemies they were not mentioned in the 1855 treaty. Therefore, it is not probable that their residence in Montana had been of long duration. Their claims, however, may have been asserted for lands which had long been lost to them by conquest to the Blackfeet Indians.

The Bannocks were, later, placed among their kindred on the Lemhi and Fort Hall reservations.

Paragraph XI of the petition quotes article 2 of the Eastern Shoshone and Bannock treaty of July 3, 1868 (15 Stat. L., 673), and alleges, in effect, that the United States failed to comply with said article when the Bannocks were placed upon the Fort Hall Reservation instead of on the Wind River Reservation with the Eastern Shoshones.

It is evident from the reading of this article that two reservations were contemplated thereby, one for the Bannocks, which would embrace portions of the Portneuf and the "Kansas Prairie" countries, and the other for the Shoshones on the Wind River Reservation, Wyoming. The Wind River Reservation was actually established by the terms of this article, but the Bannock Reservation was to be set aside by Executive Order. The Bannock Reservation (Fort Hall) was set aside by Executive Order of [fol. 121] June 14, 1867 (this was before the treaty providing a reservation for the Bannocks). The Fort Hall Reservation is in territory now claimed by the Northwestern Band of Shoshones, but the Camas Prairie mentioned herewith and referred to in the treaty as the "Kansas Prairie", is shown in Rand, McNally and Company's Atlas as being in Camas County, Idaho, which is in territory claimed by and acknowledged to be in the possession of the Western Band of Shoshones.

This paragraph also claims that the United States failed to locate the Bannock Indians on the Wind River Reservation, Wyoming, but instead gave them a reservation in Idaho, and settled the Arapaho Indians on the Wind River Reservation. The settlement of the Arapahoes on the Wind River Reservation is involved in the Eastern Shoshone suit in the Court of Claims against the United States, No. H-219. A reference to article 2 of the treaty of July 3, 1868, as quoted in this paragraph, will disclose that the United States never intended to settle the Bannocks upon the Wind River Reservation, but instead, agreed to give them a reservation by Executive Order, embracing "reasonable portions of the 'Port Neuf' and 'Kansas Prairie' countries" for their occupancy. It does not appear that the United States set aside any part of the great Camas Prairie for the Bannocks, although a compliance or a noncompliance with this provisions of the treaty of 1868 appears to be immaterial to a decision in this case, inasmuch as the Bannocks appear

to be not parties to the suit, and the Camas Prairie is in land claimed by the Western Band. A reference, however, to the discussion of "Camas", page 196, Part I, Bulletin No. 30, heretofore cited, will show that there were other beds of Camas than those in the great Camas Prairie, all along the western slope of the Rocky Mountains extending to the Pacific Ocean, and there was no doubt a sufficient quantity of this root for the needs of the Indians on or in the immediate vicinity of the Fort Hall Reservation.

By Executive Order of July 30, 1869, the President declared the Fort Hall Reservation to be the reservation provided for the Bannocks in the treaty of July 3, 1868. The lands of the Shoshones are described on page 556, Part II, Bulletin No. 30, above referred to, as follows:

> * * * They formerly occupied w. Wyoming, meeting the Utes on the s., the entire central and southern parts of Idaho, *except the territory taken by the Bannock*, N. E. Nevada, and a small strip of Utah w. of Great Salt Lake. * * * (Italics supplied).

The Bannocks were not specifically mentioned in either of the Shoshone treaties of 1863, although the Government [fol. 122] recognized all the land as belonging to the Northwestern bands of Shoshones. It should be noted that in the July 30 treaty the word "bands" is given in the plural. Each of the three treaties of 1863 were negotiated with divisions of the Nation, and each division was made up of a number of bands. The Fort Hall Reservation was set aside specifically for the Boise and Bruneau bands of Shoshones, and the Bannocks, all of which were among those living in the northwestern part of the domain of the Shoshone Nation. The Sheepeater tribe was also a division of the northwestern subdivision of the Nation, a description of which is found on page 835, Part II, Bulletin No. 30, referred to heretofore, under the designation Tukuariko.

Paragraph XII of the petition refers to the treaties between the United States, Mexico, and Great Britain. It also refers briefly to the Mexican policy, and alleges that the United States did not provide new homes for the Indians or purchase their right of occupancy.

These allegations have been fully answered heretofore under Paragraph VIII, IX, and XI.

Paragraph XIII of the petition describes the country alleged to have belonged to the Northwestern Band of Shoshones.

As heretofore stated, there has nothing been found in our records, except as given in Royce's Land Cessions of the United States, and in Bulletin No. 30 heretofore referred to, to show the lands of any particular band, or the lands of the entire division of the Shoshone Nation that participated in the treaty of July 30, 1863. However, the General Land Office's planimeter computation of the area described in this paragraph of the petition shows a total of 12,667,392 acres, 5,606,093 acres of which is in Utah, and 7,061,299 acres in Idaho.

This paragraph, after mentioning specific quantities in Utah and in Idaho, refers to land in Wyoming and Nevada, to which it is inferred the said Indians assert some sort of claim. The above computation does not include any lands in Wyoming or in Nevada. However, the General Land Office computed the area described in a call of the Court of Claims on this Department, and found that certain lands described in the call lay in Wyoming and mentions 314,265 acres, with an area in Nevada of 2,765 acres. This paragraph alleges also a claim for fifteen million dollars for land, including the value of the Camas Prairie, and Sago root country. The Camas Prairie is outside the boundaries of any area described for these Indians, and we have been unable to locate any region known as Sago root country. [fol. 123] Paragraph XIV of the petition asks for an accounting, and alleges a claim for seventy thousand dollars with interest, for failure of the United States to comply with the terms of the treaty relating to payments provided for under the treaty.

It is assumed that the General Accounting Office will analyze the accounts of these Indians and submit a report thereon to your Department.

Paragraph XV of the petition states the population of the various divisions of this Nation in 1863.

As heretofore stated in the answer to Paragraph IV, we are unable to furnish any accurate figures as to the population prior to 1868. Therefore, we are unable to say whether or not the statement made herein as to population in 1863 is correct.

Paragraph XVI of the petition asserts a total claim of $15,070,000, or some other sum, and prays judgment in that amount and for attorneys' fees.

The amount, if any, to be awarded the Indians is a matter for the court to determine.

There are enclosed herewith two copies each of letters, one dated January 2, 1851, from H. R. Day to the Commissioner of Indian Affairs, and three dated May 2, May 8, and June 28, 1852, from J. H. Holeman, Indian Agent, Great Salt Lake City, Utah.

The first gives a summary of the tribes in Utah, and the letters from Mr. Holeman deal with the unrest and the causes therefor of the Shoshone Indians.

Very truly yours, (signed) Oscar L. Chapman, Assistant Secretary.

Enclosure 315163.

[fol. 124] IN THE COURT OF CLAIMS

No. M-107

THE NORTHWESTERN BAND OR TRIBE OF SHOSHONE INDIANS AND THE INDIVIDUAL MEMBERS THEREOF, Petitioner,

vs.

THE UNITED STATES OF AMERICA, Defendant

MOTION FOR CALL UPON THE SECRETARY OF THE INTERIOR

Now comes the Petitioner in the above entitled cause by their attorneys, Charles H. Merillat and Charles J. Kappler, and moves the Court that a Call upon the Secretary of the Interior be made to file with the Court certain information indicated below, which counsel state is relevant, material and competent to the cause of the Petitioner, viz:

(1). Total number of acres within the area bounded as follows:

"Portneuf Mountains on the East; the Valley of the Snake or Shoshone River on the North and extending as far as Raft River; on the West by Raft River; and on the South by Great Salt Lake," giving separately the number of acres in Utah and the number of acres in Idaho within the foregoing described area.

(2). Total number of acres within the above described area granted to Railroad Companies under land-grants by Congress.

(3). Names of the National Forest reservations created by the United States within the above described area; dates when such reservations were established; the estimated number of acres in each such reservation; whether such reservations are located in Utah or Idaho; and the number of acres in each such reservation separately where any reservation is partly within each said State.

(4). Total number of acres within the above described area granted to Utah and number of acres granted to Idaho for school purposes.

(5). Total number of members of the Shoshone Nation of Indians when the treaties of July 2, 1863 (18 Stat. 685-2 Kappler, 848) and July 30, 1863 (13 Stat. 663-2 Kappler, 850) were made.

(6). Copy of the rolls of the members of the Northwestern Band of Shoshone Indians upon which the twenty (20) annual payments of $5,000. each was stipulated to be paid to said Band by the treaty of July 30, 1863.

(7). Copies of receipts from the Northwestern Band of Shoshone Indians showing payment to them in money or goods of the $5,000. stipulated to be paid said Band by the treaty of July 30, 1863.

[fol. 125] (8). Copy of Communication from Acting Indian Commissioner Van Valkenburg, dated September 22, 1865, addressed to Governor Caleb Lyon, of Idaho, together with copy of report made by Governor Lyon in reply thereto, recommending a reservation in Southern Idaho on the Malade or Shoshone River for protection of settlers on the Great Camas Prairie.

(9). Photostatic copy of Land Office Map of Idaho, 1913, showing Portneuf Mountains.

Respectfully submitted, (Signed) Charles H. Merillat, Attorney of Record.

Charles J. Kappler, of Counsel.

[fol. 126] COURT OF CLAIMS OF THE UNITED STATES

No. M-107

THE NORTHWESTERN BAND OR TRIBE OF SHOSHONE INDIANS AND THE INDIVIDUAL MEMBERS THEREOF

v.

THE UNITED STATES

Evidence for the Plaintiff

Reply of the Interior Department, for Claimant, Dated Washington, D. C., the 29th day of April, 1936

Claimant's counsel, Chas. H. Merillat and Joseph Chez; defendant's counsel, George T. Stormont.

United States Department of the Interior,

Office of the Secretary,
Washington, April 29, 1936.

Hon. Willard L. Hart, Chief Clerk, U. S. Court of Claims.

MY DEAR MR. HART:

Reference is made to your request of October 24, 1935, transmitting a call by the Court of Claims for certain information and documents for use as evidence in case No. M-107, the Northwestern Band or Tribe of Shoshone Indians and the individual members thereof *v.* The United States.

The motion for call contains 9 numbered paragraphs. Nos. 1, 2, 3, and 4 relate to land matters. The areas and data relative to the lands of these Indians have been compiled by the General Land Office and were submitted by letter of January 24, 1936, from the Assistant Commissioner of that office addressed to the Commissioner of Indian Affairs, the original of which is transmitted herewith.

In connection with the call the General Land Office transmitted certain maps called for in paragraph 9. These maps are enclosed herewith.

Paragraph 5 requested a statement as to the total number of members of the Shoshone Nation of Indians when the treaties of July 2 and July 30, 1863, were made.

The statistical tables in the reports of the Commissioner of Indian Affairs show the Northwestern Band of Shoshone [fol. 127] Indians to be from 1,500 to 1,800 from 1864 to 1868. The number given for 1869 is 1,200. Other bands are also shown in certain of the tables set out in the reports of the Commissioner of Indian Affairs, but the population of the entire nation is nowhere shown, and we have been unable to locate any other statements during these or prior years showing the population either of the entire nation or any band or bands thereof. The report for 1863 does not reveal the population.

Paragraph 6 requests a copy of the rolls of the members of the Northwestern Band of Shoshone Indians upon which the 20 annual payments of $5,000 each were to be paid by the treaty of July 30, 1863.

A careful search of the records has been made but we have been unable to find either the original or any copy of the payment roll of this band of Indians under the 1863 treaty. If such roll is now in existence it would no doubt be in the files of the General Accounting Office.

The above is also applicable to the information called for in paragraph 7.

There are enclosed herewith photostat copies of letters mentioned in paragraph 8 of the call.

With further reference to paragraph 5 there is also among the enclosures a copy of a roll of the Bannock and Shoshone Indians occupying the Fort Hall Reservation prepared in 1878, which is certified to by Joseph Hall, Second Lieutenant, 14th Infantry, as being a true copy of the original. The original of this roll is not in the files of this Department.

Sincerely yours, T. A. Walters, First Assistant Secretary.

Enclosure 794555.

(Filed May 1, 1936, Court of Claims.)

United States Department of the Interior,

General Land Office,

Washington, January 24, 1936.

In reply please refer to 1621727 "K" JAR.
Office of Indian Affairs, received January 25, 1936. 4551.

No. M-107

NORTHWESTERN BAND OR TRIBE OF SHOSHONI INDIANS

v.

THE UNITED STATES, CT. of CLS.

The Commissioner of Indian Affairs.

MY DEAR MR. COLLIER:

By your letter L-C 58652-35, November 4, you requested certain information for use as evidence in the above entitled suit, involving the area described as follows:

"Portneuf Mountains on the East; the Valley of the Snake or Shoshone River on the North and extending as far as Raft River; on the West by Raft River; and on the South by Great Salt Lake."

The information requested is as follows, reference being had to paragraphs of your letter as numbered by you:

[fol. 128] Paragraph 1

Number of acres thereof in Utah as shown by planimeter reading	1,577,000
Number of acres thereof in Idaho as shown by planimeter reading	2,713,000
Total	4,290,000

Paragraph 2

The area of land in the States of Utah and Idaho within the boundaries of the Shoshoni Indian Reservation (Northwestern Band), Treaty of July 30, 1863 (13 Stat. 663), and falling within the limits of the grant to the Central Pacific Railroad (now Railway) Company under the act of July 1,

1862 (12 Stat. 489) and the act of July 2, 1864 (13 Stat. 356), is as follows:

	Utah *Acres*	Idaho *Acres*	Total *Acres*
Properly patented to company under its grant	608,440.94	21,417.02	629,857.96
Erroneously patented to company under its grant (mineral segregations as shown by plat)	78.37	.....	78.37
Vacant subject to right of company under its grant	7.28	441.52	448.80
Vacant subject to right of company under its grant but which under the act of April 23, 1928 (45 Stat. 448), has been sold by the company to the United States, as evidence by quitclaim deed dated August 2, 1929, recorded Aug. 30, 1929, and approved by the Attorney General, December 17, 1929	8,770.76	.....	8,770.76
Patented to the company under the relief act of June 22, 1874 (18 Stat. 194), within the boundaries of the Indian reservation	1,353.07	.....	1,353.07
Total	618,650.42	21,858.54	640,508.96

Paragraph 3

The Forest Service by letter of January 14, 1936, submitted the following:

"The names of the National Forests involved are the Minidoka and the Cache, each of which is located partly in the State of Idaho and partly in the State of Utah.

"The old Raft River Forest Reserve was created by Proclamation of November 5, 1906, and was included in the Minidoka National Forest on July 2, 1908.

"The Port Neuf Forest Reserve was created by Proclamation of March 2, 1907, which was included in the Pocatello Forest Reserve on July 1, 1908. The Pocatello Forest Reserve was originally established on September 5, 1903. The Bear River Forest Reserve was created by Proclamation of May 28, 1906, and was transferred to the Pocatello Forest Reserve on July 1, 1908. The Pocatello Forest Reserve was transferred to the Cache National Forest by Proclamation of October 9, 1917.

"The areas within these two National Forests which were formerly within an Indian Reservation, as shown by the red line on the map submitted with your letter are: in Utah, 101,579 acres, of which 9,176 acres are in the Cache and 92,403 acres in the Minidoka; in Idaho, 370,969 acres, of

which 215,587 acres are in the Caché and 155,382 acres in the Minidoka."

[fol. 129] Paragraph 4 (School Grants)

The area of lands in the States of Idaho and Utah within the above-described boundaries is as follows:

	Utah *Acres*	Idaho *Acres*	Total *Acres*
Clear listed to State under indemnity school land laws	46,658.19	34,963.40	81,621.59
Granted to State in place for support of common schools	150,309.92	103,894.13	254,204.05
Lands selected by and clear listed to State under quantity grants made by acts of Congress	72,580.36	3,200.00	75,780.36
Total	269,548.47	142,057.53	411,606.00

Paragraph 9

In lieu of a photostatic copy of an official map of Idaho, 1913, showing Portneuf Mountains, a regular copy of said map is enclosed. Also a boundary map.

Very respectfully, Antoinette Funk, Assistant Commissioner.

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* * * * * * *

[fol. 130] United States Department of the Interior
Office of the Secretary
Washington

April 22, 1938.

The Honorable, The Attorney General,

My Dear Mr. Attorney General:

Reference is made to the suits by various bands of Shoshone Indians now pending in the courts.

When collecting data with reference to the suit of the Shoshone Tribe against the United States, No. 668 in the United States Supreme Court, we were unable to find a copy of a map transmitted with the various treaties negotiated with the Shoshones. Moyle & Wilkinson, attorneys of this city, under date of February 14, 1938, addressed a letter to the Commissioner of Indian Affairs in which they referred to the map submitted with such treaties and requested that it be found and a copy thereof be made for

them. In connection with Mr. Wilkinson, a further search reveals that a letter dated December 30, 1863, by the Commissioner of Indian Affairs to Hon. John B. Usher, Secretary of the Interior, included the map referred to with the five different treaties made by the United States with certain bands of Shoshone Indians. Instead of the map being returned to the Indian Office, it was transmitted to the Congress. The map was never returned to our files but recently it was obtained by the Archives from the files of the Senate. Copies were made and transmitted to the Indian Office.

Inasmuch as, had this map been located when the report on the Eastern Band of Shoshones was prepared it would have been transmitted therewith, there are enclosed herewith two photostat copies of the copies prepared by the Archivist. These copies are for use in any other litigation connected with the Eastern Band, Northwestern Band, or any other bands of Shoshones that may be permitted to file suit.

Sincerely yours, Oscar L. Chapman, Assistant Secretary of the Interior.

[fol. 131] IN THE COURT OF CLAIMS

No. M-107

THE NORTHWESTERN BAND OR TRIBE OF SHOSHONE INDIANS and Individual Members thereof, Plaintiff

v.

THE UNITED STATES, Defendant

MOTION FOR CALL ON DEPARTMENT OF INTERIOR

Now comes the plaintiff and moves that this Honorable Court call on the Department of the Interior for the following information and documents necessary to the prosecution of this cause, and relevant, material and competent evidence herein:

1. The total number of acres in the State of Idaho within the following boundaries, to-wit:

On the east by the Portneuf and Bear River ranges of mountains and the eastern shore of the Great Salt

Lake; on the south by the middle of the Great Salt Lake Desert, and the crest of the mountains separating the waters of the Snake and Humboldt Rivers; on the west by Salmon Falls on Snake River and the point on the crest of the mountains separating the Snake [fol. 132] and Humboldt Rivers where a line drawn from said Salmon Falls to the lower part of the Humboldt River and the Su-non-to-yah or Smith Creek Mountains, would intersect said crest of said mountains; on the north by the Snake River.

2. The total number of acres in the State of Utah within the boundaries as described in paragraph 1 of this motion.

3. The total number of acres in the State of Nevada within the boundaries as described in paragraph 1 of this motion.

4. A map showing the boundaries as described in paragraph 1 of this motion.

(Sgd.) Joseph Chez (by HJG) Attorney for Plaintiff.

Charles J. Kappler, Herman J. Galloway, Moyle & Wilkinson, Frank K. Nebeker. Of Counsel.

[fol. 133] United States Department of the Interior
Office of the Secretary
Washington

Sep. 16, 1939.

Hon. Willard Hart, Chief Clerk, United States Court of Claims.

My Dear Mr. Hart:

Reference is made to the call of the Court of Claims for information to be used as evidence in Suit No. M-107, The Northwestern Band or Tribe of Shoshone Indians v. the United States.

The General Land Office has prepared a diagram on a map of this area upon which is shown the boundaries of the lands involved and the areas in the States of Utah, Idaho and Nevada. The diagram is in answer to para-

graph 4 of the call, while the areas correspond to paragraphs 1, 2 and 3.

The area in Idaho, requested by paragraph 1, is found to be 6,067,000 acres; that requested by paragraph 2, is 6,389,000 acres, and that by paragraph 3 is 3,187,000 acres, making a total of 15,643,000 acres.

The diagram is enclosed herewith.

Sincerely yours, Oscar L. Chapman (sgd.) Assistant Secretary.

Enclosure 2290826.

[fol. 134] P. R. S. #12390

The Secretary of the Interior

Washington

Jun. 19, 1939.

Hon. D. Worth Clark, United States Senate.

My dear Senator Clark:

In further reference to your letter of April 20, in which you requested preparation of a map showing lands set apart for the Shoshone Indians under each of the five treaties in 1863 with the various divisions of the Nation, there is enclosed a map prepared in answer thereto.

The map was prepared in the General Land Office and follows closely the calls of the treaty as formerly interpreted by Governor Doty. There is enclosed a copy of a letter from the Assistant Commissioner, Office of Indian Affairs, to the Commissioner of the General Land Office of May 12 in which certain information was furnished and citations were given to documents from which the lines were more readily determined. There is also enclosed a copy of the letter from the Assistant Commissioner of the General Land Office to the Commisisoner of Indian Affairs transmitting the map to that Office.

In addition to the citations mentioned in the letters between the two Offices above-mentioned, access was had to certain maps and documents from the Geological Survey in determining the dividing lines between the different bands of the Nation, parties to these various treaties.

In determining the line between the territory of Pocatello and the Eastern Band of Shoshones, a record was found in the Geological Survey known as "Volume 12, Hayden Survey; also H. A. (200) 1, 1878 on page 17. Authority of Hayden, Prepared by Wheat." The map has not been approved by either the Commissioner or Assistant Commissioner of the General Land Office, but the enclosed copy of the letter of transmittal will, no doubt, serve as an approval thereof.

There is enclosed a copy of a memorandum which was also transmitted to the General Land Office for use in locating the boundaries.

Sincerely yours, (Sgd.) Harry Slattery, Acting Secretary of the Interior.

6-MS-13.
Enclosure 1962458.

[fol. 135] Address only the Commissioner of the General Land Office.

United States Department of the Interior
General Land Office
Washington

Jun. 8, 1939.

In Reply Please Refer to 1772863 "E".

The Commissioner of Indian Affairs.

My dear Mr. Collier:

Reference is made to your letter dated May 12 (your file: Land Division Claims 26778-39), in which you request that a map be prepared for Senator Clark showing the boundaries and the areas of the five divisions of the Shoshone Nation, according to the 1863 treaties, to be used in connection with pending legislation.

The map has been prepared and is transmitted herewith. The following papers are being returned:

Copy of the original treaty.

Bulletin No. 120.

Reprint of pages 625 to 634 of the American Anthropologist.

Doty map and another map transmitted with the treaty Uinta and Yampa Indians.

Memorandum giving the boundaries of the five divisions of the Shoshone Nation according to the treaties.

Very truly yours, (Sgd.) Antoinette Funk, Assistant Commissioner.

Encls.

[fol. 136] Refer in reply to the following:

Address only the Commissioner of Indian Affairs.

United States Department of the Interior

Office of Indian Affairs

Washington

May 12, 1939.

Hon. Fred W. Johnson, Commissioner of the General Land Office.

My dear Mr. Johnson:

The Department is in receipt of a letter from Hon. D. Worth Clark, United States Senator from Idaho, in which a request is made for the locations of certain Indian treaty lines and the areas lying within certain boundaries. A copy of the Senator's letter is enclosed.

While the areas described in the treaties were recognized as being in the possession of the Shoshone Indians, and no part, except that recognized as Eastern Shoshone land, was ever ceded to the United States, it was practically all disposed of as public lands of the United States. No accurate maps of the lands so recognized and so disposed of by the United States have ever been constructed.

Paragraph 1 of the letter from the Senator details the extent of the information desired as to the map. With the letter, there was enclosed a sheet showing the boundaries given in the treaties, together with citations thereto in Kappler, in all cases except one. The reference to the statutes at large has been inserted in the margin, in pen, for all except that of October 14, 1863, at Soda Springs, Idaho. This treaty was ratified by the Senate with an amendment, but was never presented to the Indians for their ratification, therefore it was not published in the statutes at large. There is enclosed herewith a copy of the original treaty which has been borrowed from the National Archives and

should be returned to this Office when it has served its purpose.

A careful study has been made of the calls of the treaties, and a description thereof has been prepared in the light of information available to this Office for both the exterior and the interior boundaries. A copy thereof is transmitted for what it may be worth in assisting your office in the construction of the map.

[fol. 137] As an aid to your office in identifying certain points in these lines, attention is invited to Part 28 of the Survey of Conditions of the Indians in the United States, the Hearings before a Subcommittee of the Committee on Indian Affairs, United States Senate, 72nd Congress, First Session, pursuant to S. Res. 79 and 308 (70 Cong.) S. Res. 263 and 416 (71 Cong.) and S. Res. 323 72nd Cong.) The principal points are mentioned on pages 14842 to 14846 and 14855.

Further information may be gleaned from Bureau of American Ethnology, Bulletin No. 120, pages 161 to 169, and pages 625 to 634, American Anthropologist, Vol 39, No. 4, October-December, 1937, which shows the location of the different tribes and bands in part of this area. The latter document contains a map of the location which does not show, with accuracy, the lines given in the treaties, but it may give some aid in the preparation of the maps. Bulletin No. 120, and a reprint of pages 625 to 634 of the American Anthropologist are enclosed. They are not the property of the United States but have been borrowed for your use, if desired. They should be returned to this Office when they have served their purpose.

There is also enclosed a map which accompanied the above mentioned treaties with the Shoshones, known as the Doty map. In addition, there is enclosed another map which was transmitted with the treaty with the Uinta and Yampa Indians. These maps were, temporarily withdrawn from the National Archives, charged to clerks in this Office and should be returned here. The Doty Map is not in first class condition.

Attention is especially invited to the request of the Senator contained in the last paragraph of his letter wherein he has requested a statement as to the acreage contained within certain boundaries described.

It would be appreciated if your office could construct this map at the earliest practicable date, as the original letter from the Senator was made P. R. S. special by the Department.

Sincerely yours, William Zimmerman, Jr. Assistant Commissioner.

Enclosure ~~T~~94245, 5 aw 9.

[fol. 138] I. Exterior Boundary of Shoshone Nation

Beginning at the point where the 112th meridian crosses the Bitterroot range of mountains, which forms the boundary between Idaho and Montana ("the mountains on the north side of the Valley of Shoshonee or Snake River"); thence east along the summit of that range to Yellowstone park; thence along the Continental Divide to the Wind River Mountains so as to include all of the headwaters of the Snake River; thence southerly along the summit of the Wind River range of mountains to the southern tip of said range; thence to the Sweetwater River ("Peenahpah River"); thence down said river to the point where it enters the North Platte River; thence in a southerly direction up the North Platte River; ("north fork of Platte or Koo-chin-agah") to its headwaters in North Park ("North Park or Buffalo House"); from the headwaters of the North Platte (Grizzly Creek, near the Continental Divide just east of Steamboat Springs) west aross the Continental Divide to the Yampa River ("Yampah River"); thence westerly with said Yampa River to the point where it enters Green River; thence to the eastern end of the Uinta Mountains ("Uintah Mountains"); thence along the summit of said range of mountains to its western end; thence from the western end of the Uinta Mountains, westerly via the highest points (probably the boundaries separating [fol. 139] Wasatch and Utah Counties on the south from Salt Lake and Summit Counties on the north) to the Oquirrh Mountains in the vicinity of Fort Crittenden Post so as to include Great Salt Lake, Tooele, and Rush Valleys ("Great Salt Lake, Tuilla, and Rush Valleys") (Governor Doty on his map drew the eastern boundary of the Goship Shoshones through the location of "Crittenden"); thence southerly along the summit of the Oquirrh Mountains to the southern tip of that range; thence along the "Green

Mountains'' mentioned in the Goship Shoshone treaty and ''Wi-co-bah and the Colorado Desert'' mentioned in the Western Shoshone treaty, to the southern end of the Desatoya Mountains in Nevada.

Testimony taken before the Subcommittee of the Senate Committee on Indian Affairs at Elko, Nevada, in 1932, showed that ''Wi-co-bah,'' meaning ''mountains covered with white,'' is the Indian name of a mountain about 8 or 10 miles southwest of Duckwater, Nevada, near the Ruby Valley guide meridian and between the 38th and 39th parallels. To the extent, if any, that the above boundaries are not ascertainable, then follow the outline as it appears on Governor Doty's map to the southern end of the Desatoya Mountains in Nevada. It will be noted on Governor Doty's map that the mountain or range of mountains which he fixed as the southern boundary of the Goship and Western Shoshones is located between the 38th and 39th parallels and a short distance east of the 116th meridian. It will be seen, also that this area was marked ''unexplored'' [fol. 140] on Governor Doty's map and that he made a few pencil or pen scratches to indicate the probable location of this boundary.

From the southern end of the Desatoya range of mountains (''Su-non-to-yah Mountains or Smith Creek Mountains''—Smith Creek Valley is immediately east of these mountains, and Smith Creek arises in the Desatoya Mountains; some old maps label the mountains wherein the Smith Creek rises as the ''Smith Creek Mountains''), the western boundary of Shoshone country should be drawn north along the summit of that range of mountains and the summit of the New Pass range of mountains; thence northerly along the summits of the ranges to the northward via Battle Mountain to the point where the 116th meridian and the 42nd parallel cross; thence northerly or northeasterly to the Bitterroot range of mountains via Salmon Falls on the Snake River; thence easterly along said Bitterroot range of mountains to the point of beginning.

It will be noted that on Governor Doty's map the western boundary line is drawn precisely through the intersection of the 116th meridian and the 42nd parallel. It will also be noted that the treaty with the Mixed Bands of Bannock and Shoshone Indians gives ''Salmon Falls on

Shoshonee River" as one of the western extremities of the Shoshone Nation.

[fol. 141] II. Interior Boundary Lines

Northwestern Shoshones

The boundaries of Northwestern Shoshone territory are as follows: beginning at the northern end of the Portneuf range of mountains ("Porteneuf Mountains"), southerly along the summit of that range to its southern end; thence via Brigham City (indicated as "Box Elder" on Governor Doty's map) to the eastern shore of Great Salt Lake (Willard Spur of Bear River Bay); thence southerly along the eastern shore of said lake to a point where a line drawn from west to east across the middle of the Great Sale Lake Desert ("middle of Great Desert") and projected across the lake, would intersect such eastern shore (probably to the vicinity of "Lake Point"); thence westerly along said line drawn through the middle of said desert to the western limits of said desert; thence in a westerly direction to Jasper, Nevada; thence northerly along the summit of the Pequop range of mountains to the northern end of said range; thence in a northwesterly direction so as to exclude the headwaters of all streams and rivers flowing into the Humboldt River (approximately via Fenelon and Summer Camp) to the summit of the range of mountains separating the rivers and streams flowing northward into the Snake River from the rivers and streams flowing southward and westward into the Humboldt River (this boundary would strike the summit of said range of mountains near the head-[fol. 142] waters of Deer Creek, which flows into Salmon Falls Creek); thence along the range or ranges so separating the waters of the Snake River from the waters of the Humboldt River to the point where said mountains are crossed by the western boundary of the entire Shoshone Nation heretofore designated; thence in a northeasterly direction along the said western boundary to Salmon Falls on Snake River; thence up said Snake River to a point due north of the northern end of the Portneuf Range of mountains; thence due south to said range of mountains and the point of beginning. The northern boundary of the Western

Shoshones is given in their treaty as the "Wong-goga-da Mountains and the Shoshonee River Valley". The high mountains in northern Nevada which separate the waters of the Snake and Humboldt Rivers are known by the Western Shoshone Indians as the Wong-goga-da Mountains. The summit of these mountains constitutes the southern edge of the Shoshone River Valley referred to in their treaty, for Snake River was formerly known as Shoshonee River as will be seen from an examination of Governor Doty's map.

The Northwestern Shoshone treaty defines separately that portion of Northwestern Shoshone territory claimed by one chief—Chief Pokatello. That area is separated from the other Northwestern Shoshone lands by a line drawn as follows: beginning at the mouth of the Raft River; thence up said river to its headwaters in northwestern Utah; thence in a southwesterly direction (approximately via Montello and Cebre) to Jasper.

[fol. 143] *Western Shoshones*

The western and southern boundaries of the Western Shoshone country have already been defined as has the northern boundary, which also forms a portion of the southern boundary of the Northwestern Shoshones. There remains, therefore, only the eastern boundary separating the Western Shoshones from the Goship Shoshones to be defined. The Western Shoshone treaty states that the eastern boundary of those Indians was "Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley." The mention of Great Salt Lake Valley in this treaty obviously is a reference to one of the valley- south of Steptoe Valley in which, years ago, there existed a salt lake. Numerous "dry lakes" are to be found in southern and eastern Nevada. Steptoe Valley can be located on any map of Nevada lying between the Shell Creek and Egan ranges of mountains. The eastern boundary of the Western Shoshones, therefore, should be drawn as follows: from Jasper, Nevada, in a southerly direction along the summits of the Pequop, Shell and Fortification ranges of mountains until said line intersects the southern boundary of the entire Shoshone Nation heretofore outlined.

Goship Shoshones

The boundaries between the Goship Shoshones and the Western Shoshones and between the Northwestern Shoshones and the Goship Shoshones have been determined. [fol. 144] All that remains, therefore, is to locate the line separating the Goship Shoshones from the Eastern Shoshones. Great Salt Lake and the valleys of Rush and Tooele are given in the treaty with the Goship Shoshones as their eastern boundary. Rush and Tooele Valleys are just west of the Oquirrh range of mountains. Hence the dividing line should be drawn along the summit of this range of mountains. It should begin at the point where the exterior boundary of the entire Shoshone Nation, heretofore indicated, strikes said summit, northerly to the shore of Great Salt Lake. The projection of this line due north until it intersects the line drawn east and west across the middle of the Great Salt Lake Desert and across the lake to its eastern shore (northern boundary mentioned in the Goship treaty) would complete the boundary separating the Eastern and Goship Shoshones.

Mixed Bands of Bannocks and Shoshones

The Mixed Bands of Bannocks and Shoshones in their treaty were described as "occupying the Valley of Shoshonee River." In this treaty these Indians adopted and became bound by the provisions of the Northwestern Shoshone treaty. Therefore they could not claim that portion of Snake River Valley acknowledged to be Northwestern Shoshone land. Consequently the best way to de- [fol. 145] fine the area claimed by the Mixed Bands is to outline for them all of the Valley of the Snake River to the summits of the mountains on each side, excluding, however, those lands set apart for the Northwestern Shoshones. The western and northern boundaries of this area would coincide, of course, with the exterior boundaries of the entire Shoshone Nation.

Eastern Shoshones

The remaining portion of Shoshone country east of the boundaries of the Mixed Bands, Goship, and Northwestern Shoshones, is the area set aside for the Eastern Bands of Shoshone Indians.

Computation of Acreage

Senator Clark has requested that there be computed the number of acres in each of the areas outlined. He has further requested that where an area lies partly in one state and partly in another state the number of acres in each state be given.

Not only should there be a computation of the number of acres in the entire Northwestern Shoshone area, but there should be a separate computation of the area labelled by Governor Doty "Pokatello", as outlined above.

[fol. 146] P. R. S. 12399

Land Division. Claims. 26778-39. F G T.

May 9, 1939.

Hon. D. Worth Clark, United States Senate.

My Dear Senator Clark:

I have your letter of April 20, in which you request the preparation of a map showing the lands set apart for the Shoshone Indians under each of the five treaties made in 1863 with the various divisions of that Nation.

We shall be glad to prepare such a map and will also compute as accurately as possible the number of acres involved. Considerable research work will have to be done to obtain the necessary material and you will understand that it may take some time before the map and other data can be sent to you. We shall, however, push the work along as fast as possible.

Sincerely yours, (Sgd.) Harry Slattery, Acting Secretary of the Interior.

4-MS-29-1.

[fol. 147] D. Worth Clark, Idaho

12390

Committees: Irrigation and Reclamation; Joint Forestry Committee; Banking and Currency; Post Offices and Post Roads; District of Columbia; Patents.

United States Senate

Washington, D. C.

April 20, 1939

Honorable Harold L. Ickes, Secretary of the Interior, Washington, D. C.

My dear Mr. Secretary:

In order that I may be better advised in connection with pending legislation as to the claims of the Bannock and Shoshone Indians, many of whom are now located in my state, I would appreciate your having prepared for me by one of your map experts a map showing the lands set apart for each of the five divisions of the Shoshone Nation by five treaties negotiated in 1863. According to my information, these treaties were negotiated (1) with the Eastern Bands of Shoshone Indians on July 2, 1863, at Fort Bridger, Wyoming; (2) with the Northwestern Bands of Shoshone Indians on July 30, 1863, at Box Elder, Utah; (3) with the Western Bands of Shoshone Indians on October 1, 1863, at Ruby Valley, Nevada; (4) with the Shoshone-Goship bands of Indians on October 12, 1863, at Tuilla Valley (now Tooele), Utah; (5) with the Mixed Bands of Bannocks and Shoshones on October 14, 1863, at Soda Springs, Idaho. I have already introduced a jurisdictional bill in the Congress for certain of these Indians, and believe the requested map would be helpful to me and other Senators in understanding the problems involved.

I understand that recently there was discovered in the old files of the Senate Committee on Indian Affairs, which are now in the possession of the National Archives, the original map upon which Honorable James Duane Doty, Governor and Superintendent of Indian Affairs for the Territory of Utah, who negotiated the aforesaid treaties, traced the boundaries of the land thereby set apart for each of said five divi-ons. This map, I understand, was forwarded to

the Commissioner of Indian Affairs by Governor Doty soon [fol. 148] after he concluded the negotiation of the treaties, and was sent along with the treaties when they were transmitted to the Senate by President Lincoln for ratification. If you do not have a copy of Governor Doty's map, I am sure the original or a photostatic copy thereof can be obtained from the National Archives.

The base map which Governor Doty used to indicate the land set apart for the five divisions and which was probably the best map then available for his use, did not, as you will note, show all of the rivers, mountains, and other topographical features named in the treaties as constituting certain boundaries. Consequently, it seems that he was not able in a few instances to outline the treaty boundaries with complete exactness. I believe, however, that one of your expert draftsmen, having before him the boundary provisions of the five treaties and the map prepared by Governor Doty, could, with substantial accuracy, outline the areas set apart in these treaties for the five respective divisions of the Shoshone Nation. For your information and convenience I am enclosing herewith a copy of the boundary provisions as they occur in the five treaties, but you undoubtedly have access to the treaties themselves. In this connection, it appears that Governor Doty was originally commissioned to negotiate one treaty with the entire Shoshone Nation. He found such an undertaking impossible, however, because of his inability to assemble all of the chiefs and head men together at one time. Consequently he negotiated the aforesaid treaties with the five divisions of the Shoshone Nation. Under these circumstances it is obvious that they must be construed together.

I would appreciate also your having computed the approximate number of acres of land in each of the five areas; also, where one of these areas is partly in one state and partly in another, the approximate number of acres within each state.

Respectfully yours, (Sgd.) D. Worth Clark.

DWC:bk.
encl.

[fol. 149] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 150] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI

Upon consideration of the petition for extension of time within which to file a petition for a writ of certiorari to the United States Court of Claims in the above-captioned matter, it is this 13th day of March, 1944,

Ordered that time for filing a petition for a writ of certiorari in the above matter be, and it is hereby, extended for a period of 60 days from Apr. 3, 1944.

Harlan F. Stone, Justice.

[fol. 151] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1944

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
APR 21 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 63

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,

Petitioners,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

ERNEST L. WILKINSON,
JOSEPH CHEZ,
Counsel for Petitioners.

JOHN W. CRAGUN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 915

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Northwestern Bands of Shoshone Indians, by their attorneys, pray that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above cause on January 3, 1944.

Opinions Below.

The first opinion of the Court of Claims is reported in 95 C. Cls. 642, and appears at R. 26; the second opinion is as yet unreported, but appears at R. 77.

Jurisdiction.

The judgment of the Court of Claims was entered January 3, 1944 (R. 79). The jurisdiction of this Court is invoked under § 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, Title 28, U. S. C., § 288, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752, and the Act of February 28, 1929, c. 377, 45 Stat. 1407, § 4, Appendix, *post*, the latter being the special jurisdictional act under which this suit was instituted in the court below.[1] The time within which this petition could be filed was extended for 60 days from April 3, 1944, by the Chief Justice of the Supreme Court on March 13, 1944 (R. 115).

Questions Presented.

1. Whether the word "claim" as used in Indian treaties in its various inflections and tenses is a word of art constituting an acknowledgment or "recognition" by the United States of Indian title to the lands respectively described therein.

2. Whether the United States acknowledged or "recognized" petitioners' Indian title by the treaty of July 30, 1863, 13 Stat. 663, and related treaties,[2] to the lands described and claimed by petitioners therein.

---

[1] The special jurisdictional act provides, *op cit.*, that from the decision below "an appeal may be taken by either party, as in other cases, to the Supreme Court of the United States." Notwithstanding this statute was enacted subsequent to the Act of February 13, 1925, cited in the text, it is believed that certiorari and not appeal is the proper mode of review. See ROBERTSON & KIRKHAM, *Jurisdiction Sup. Ct. U. S.*, § 219, p. 376, note 47, citing *Klamath & Moadoc Tribes of Indians* v. *United States*, 296 U. S. 244, 245-6.

[2] Treaty of July 2, 1863 with the Eastern Shoshones, 18 Stat. 685 (R. 51); Treaty of October 1, 1863, with the Western Shoshones, 18 Stat. 689 (R. 55); Treaty of October 12, 1863, with the Shoshonee-Goship Bands, 13 Stat. 681 (R. 22); Treaty of October 14, 1863, with the Mixed Bands of Bannocks and Shoshonees, 5 Kappler 693 (R. 60).

Stated more in detail this question is that of whether petitioners' title was not acknowledged or "recognized" by the provisions of such treaties wherein,

(a) the boundaries of the land "claimed" by one of petitioner bands are specifically described in petitioners' treaty, and the boundaries of the land claimed by all of petitioner bands can be determined by reference to all of the Shoshone treaties, of which petitioners' treaty is a part;

(b) petitioner Indians (1) agreed that routes of travel through "Shoshone country" should remain free and safe for white travel, (2) consented to the establishment of military agricultural settlements and military posts along said routes, to ferries being maintained over rivers required in such country, to the erection of houses and settlements at such points in such country "as may be necessary for the comfort and convenience of travellers", to the operation and maintenance of "telegraph and overland stage lines" which were already "operated through a part of Shoshonee country" and (3) granted the right to construct a transcontinental railway "through any portion of the country claimed by them";

(c) it was provided (through an amendment added by the Senate and accepted by petitioner Indians) that nothing contained in the treaty should "be construed or taken to admit any other or greater title or interest in the lands" than existed in petitioner Indians upon the acquisition of such lands by the United States from Mexico (part of their lands having been embraced in the territory acquired from Mexico under the treaty of Guadalupe Hidalgo).

3. Whether, in any event, the United States by entering into a treaty as to lands with an Indian tribe acknowledged or "recognized" the Indian title of Indians to such of the claimed lands as was actually used and occupied by them at the time of the treaty.

4. Whether the policy of the United States has been opposed to the acknowledgment or "recognition" of the Indian title to lands within the territory acquired by the United States from Mexico.

Treaties and Statutes Involved.

The treaties are quoted in full in the record (R. 40-51). The statutes involved are set forth in the appendix, *infra*.

Nature of Suit.

This suit was brought by the Northwestern Bands of Shoshone Indians, a division of the Shoshone Nation, under a special jurisdictional act (c. 377, 45 Stat. 1407, quoted in the appendix) which authorized the Court of Claims to render judgment on "any and all claims * * * arising under or growing out of the treaty of July 2, 1863 * * *; treaty of July 30, 1863, * * * and any subsequent treaty Act of Congress, or Executive order * * *" to recover the value of certain lands lying in southern Idaho, northern Utah, and, to a small extent, in the northeast corner of Nevada. Petitioners contend that these lands were taken by the United States for its own use without petitioners' consent. The lands lying in Utah and Nevada were a part of the territory acquired by the United States from Mexico in 1848 by the treaty of Guadalupe Hidalgo. Sovereignty over the lands lying in Idaho was confirmed and conceded by the Oregon Treaty of June 15, 1846 with Great Britain (9 Stat. 869).

The case was heard by the court below without a commissioner, the court making its own findings of fact and conclusions of law. There has been no review of those findings or conclusions.[3]

[3] The practice in the ordinary case in the Court of Claims is for the case to be referred to a commissioner, who conducts a trial and makes findings of fact. On exceptions being taken to these findings, the case

Statement of Facts—Fort Laramie Treaty

As early as 1849, Indian agents and superintendents recommended that the United States negotiate treaties with the Shoshone Indians which would establish peace and friendship between them and the whites, and secure for the whites the right to traverse Shoshone country.[4] In 1851 a delegation of 60 Shoshone chiefs and headmen were invited and taken to Fort Laramie, Wyoming, where they attended a treaty council to negotiate a treaty with the United States. In addition to the Shoshone Nation the Fort Berthold (Gros Ventres, Arrickarees, and Mandans), Sioux, Cheyenne, Arapahoe, Crow, and Assiniboine tribes of Indians were present. The United States Commissioners attending the council, however, were in doubt as to whether their instructions authorized the inclusion of the Shoshone Nation.[5] Consequently the treaty which was concluded at Fort Laramie[6] did not include the Shoshone Nation, but did include the other tribes above named.

Certain of the lands described in the Fort Laramie treaty were later taken by the United States, as a result of which the Indian tribes concerned recovered judgments against the United States on the ground that such treaty

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is then argued in its entirety to the full bench. In this sense the Court of Claims reviews the findings of the commissioner (or acts as an appeal court) In Indian tribal suits, however, the usual practice is not to appoint a commissioner. Rather, oral testimony, if any, is taken before a notary public and calls are made on the departments of the government for pertinent records. The parties then "brief" the case, after which argument on the merits of the case is had before the full bench. This is denominated the "trial" of the case. By this practice, the court, instead of reviewing the findings made by the commissioner, makes its own findings. Under such procedure there is no review of the findings unless certiorari is granted by this Court.

[4] Ann. Rep. Commr. Ind. Affs. 1849, pp. 67-68.

[5] Ann. Rep. Commr. Ind. Affairs, 1851, Exec. Doc. No. 2, 32d Cong., 1st Sess., p. 445.

[6] 4 Kappler 1065

acknowledged and recognized their title to such lands. (*Fort Berthold Indians* v. *United States,* 71 C. Cls. 308, 331, 333; *Assiniboine Indian Tribe* v. *United States,* 77 C. Cls. 347, appeal dismissed and certiorari denied 292 U. S. 606; *Crow Nation* v. *United States,* 81 C. Cls. 238.)

The petitioners contend that the Fort Laramie treaty is indistinguishable in legal effect from the Shoshone treaties here sued upon, and that petitioners should therefore recover on the authority of the cases above cited for lands described in the Shoshone treaties and taken without their consent.

Shoshone Treaties.

Prior to the negotiation of the Shoshone treaties here sued upon the Surveyor General of the Territory of Utah, in which the plaintiffs were partially located, urged that before any additional surveys of land were undertaken, the "*Indian title*" should be extinguished.[7] In 1861 the Commissioner of Indian Affairs recommended that a treaty be negotiated with the Shoshone Indians which would grant to them "annuities in consideration of a right-of-way across their country."[8] In the same year, Henry Martin, then Superintendent of Indian Affairs for the territory of Utah (later one of the treaty commissioners), recommended negotiation of a treaty whereby the Shoshones would "cede to the United States *all the lands they claim,*" except certain reservations (R. 31). On September 12, 1862, James Duane Doty, then Superintendent of Indian Affairs for the territory of Utah (later the main treaty commissioner), in his annual report expressly recommended "that treaties be entered into with all of these tribes [Shoshones and

[7] Letter of October 6, 1859, from S. C. Stambaugh, Surveyor General of the Territory of Utah, to Commissioner of General Land Office, Ann. Rep. Commr. G. L. O. 1859, pp. 199-204.

[8] Ann. Rep. Commr. Ind. Affs. 1861, p. 25 (p. 642 in Report of Secretary of the Interior for 1861).

Bannocks] to *extinguish their right of occupancy.*"[9] Congress authorized the appointment of a treaty commission (Act of July 5, 1862, 12 Stat. 512, 529) but did not provide for the extinguishment of the Indian title to Shoshone land (R. 32). Acting under this statute, the Commissioner of Indian Affairs instructed the special commission appointed to carry into effect the object of Congress, *inter alia* (R. 34):

> "*It is not expected that the treaty will be negotiated with a view to the extinguishment of the Indian title to the land,* but it is believed that with the assurances you are authorized to make of the amicable relations which the United States desires to establish and perpetuate with them, and by the payment of Twenty thousand dollars of annuities in such articles as by the President may be deemed suitable to their wants for which you are authorized to stipulate, you will be enabled to procure from them such articles of agreement as will render the routes indicated secure for travel and free from molestation; also a definite acknowledgment as well of the boundaries of the entire country they claim, as of the limits within which they will confine themselves, which limits it is hardly necessary to state should be as remote from said routes as practicable." (Italics added.)

The commissioners, finding it impossible to assemble the entire Shoshone Nation together at one time (R. 39) met separately with each of its five divisions, between July 2d and October 14th, 1863 (R. 39). They met first with the Eastern Shoshones at Ft. Bridger, Wyoming, where they negotiated the treaty of July 2, 1863, 18 Stat. 685 (R. 40). This treaty set forth the northern, eastern, and southern boundaries of the Shoshone country, as defined and described by said nation (Art. IV, R. 41), but left the "western boundary • • • undefined" since there were "no

[9] Ann. Rep. Commr. Ind. Affs. 1862, p. 199.

Shoshonees from that district of country present." It also provided that a "firm and perpetual peace shall be henceforth maintained between the Shoshonee nation and the United States"; the Shoshones agreed that routes of travel through "Shoshonee country" should remain free and safe for white travel; and that the United States *may* establish military agricultural settlements and military posts along said routes, maintain ferries over rivers wherever required, and erect houses and settlements at such points in such country "as may be necessary for the comfort and convenience of travellers" (Art. II, R. 40), operate and maintain "telegraph and overland stage lines" which were already "operated through a part of Shoshonee country", and operate a continental railway "through any portion of the country claimed by" the Shoshonees.

On July 30, 1863, the commissioners met with petitioners, and concluded a treaty (13 Stat. 663) at Box Elder, Utah. This treaty, by Article II, incorporated by express reference and adoption all the provisions of the Ft. Bridger treaty. The petitioner Indians thereby granted the same rights of way and easements over their land as were granted by the Eastern Shoshones. The Box Elder treaty did not purport to describe the land of all the Northwestern Shoshone bands but did describe the "country claimed by Pokatello [a chief of petitioner Indians] for himself and his people," bounded on the west by Raft River and on the east by Porteneuf Mountains.

Like treaties were entered into with the Western Shoshones on October 1, 1863 (18 Stat. 689), the Shoshonee-Goship Bands on October 12, 1863 (13 Stat. 681), and the Mixed Bands of Bannacks and Shoshonees on October 14, 1863 (5 Kappler 693), which together constitute the entire Shoshone Nation. The successive treaties either repeated substantially the undertakings of the Ft. Bridger treaty

or incorporated it and the intervening treaties by reference.[10] Governor Doty (Chairman of the Shoshones Commission) prepared a map showing the exterior boundaries of the Shoshone Nation and the lines of the country occupied by the five different divisions of the Shoshone Nation, as set forth in the five various treaties (R. 55). This map was attached to the treaties when they were sent to the Senate for ratification (R. 57, 100-101).

Before ratification by the Senate, that body added an amendment to each of the treaties (except the treaty with the Western Shoshones), which expressly provided that nothing therein contained should be construed to admit of any greater title or interest in the lands then existed in the tribe under Mexican law. The petitioners ratified and accepted the Senate amendment (R. 57). In February, 1865, Congress authorized the President to enter into treaties with the tribes of Indians in Utah Territory for the extinction of their possessory right to agricultural and mineral lands and for their segregation on reservations (R. 58-59). A treaty was subsequently (July 3, 1868) negotiated with the Eastern Shoshones by which they gave up the territory claimed by them in the Ft. Bridger Treaty in exchange for other lands. 15 Stat. 673 (R. 59). For the taking of lands secured to them under the latter treaty they recovered in *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476; 304 U. S. 111. No further treaty or agreement was ever negotiated or attempted to be made with petitioner bands.

It is uncontradicted that practically all of the land claimed by petitioners, and for which compensation is sought, has been taken and is now possessed by the United States, or by vendees of the latter.

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[10] Northwestern Shoshone Treaty, Art. II, R. 43; Western Shoshone Treaty, Arts. II-III, R. 45; Shoshonee-Goship Treaty, Arts. II-III, R. 48; Mixed Bands Treaty, Art. II, R. 50.

The court below purported to find as a fact that "the United States, in making and ratifying the treaty [of Box Elder], did not intend that it should be a stipulation of recognition and acknowledgment of any exclusive use and occupancy right or title of the Indians, parties thereto" (R. 58). The court further purported to find as a fact that "the United States has ever exercised dominion and complete ownership over the territory and land for which plaintiff bands now seek to recover compensation,"[11] (R. 58) and concluded that the United States was not liable for the taking of the land described in the Shoshone treaties (R. 62).

Petitioners contend that these "findings" are conclusions of law, plainly at variance with the conclusions which must be drawn from the facts found by the court. To the extent that there was any evidence with respect to these conclusions, they are completely unsupported in the record. That evidence consists entirely of administrative rulings and is wholly to the contrary.

Specification of Errors to be Urged.

The Court of Claims erred:

1. In failing to hold that the word "claim", as used in Indian treaties, is a word of art constituting an acknowledgment or "recognition" by the United States of Indian title to the lands respectively described therein.

2. In holding that a treaty of "peace and amity" with an Indian tribe does not constitute an acknowledgment or recognition by the United States of the Indian title of the Indians to the lands they used and occupied.

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[11] The court purported specifically to find that prior to and at the time of the treaty the United States had not recognized any right of exclusive occupancy in plaintiff tribe as against the United States to any territory in the Mexican Cession. (Fdg. 21, R. 58).

3. In holding that the Treaty of July 30, 1863, 13 Stat. 663, and related treaties, did not constitute an acknowledgment or "recognition" of petitioners' title to land.

4. In holding that as to land claimed by Pokatello and his Band, the Treaty of July 30, 1863, did not constitute an acknowledgment or recognition of petitioners' title.

5. In making and entering Finding No. 15.

6. In making and entering Finding No. 21.

7. In refusing to admit in evidence Plaintiff's Exhibit 4 filed March 4, 1941.

8. In holding that petitioners are not entitled, under the Treaty of July 30, 1863, and related treaties, to recover for the taking of their lands by respondent.

Reasons for Granting the Writ.

The questions presented are of general importance. There are over 50 treaties with Indian tribes in which the word "claim" in its various inflections and tenses in relation to land described therein, is used to denote Indian title (see appendix). The opinion below in the light of the historical meaning attributed to these treaties and the settled decisions of this Court, plainly misconstrues the treaty upon which the suit is founded. A review of the lower court's construction is not foreclosed by the court's making its interpretation in the form of a finding of fact, especially where the only supporting evidence consists of administrative interpretations to the contrary. The court's interpretation fails to read the treaty of petitioners according to the established meaning of the words used; and it ignores the cardinal rule of construction enunciated by this Court that Indian treaties shall be construed liberally in the Indians' behalf, as the Indians would have understood them. It

fails even to follow the rule with respect to international treaties, that where the treaty fairly admits of two constructions, one restricting, the other enlarging the rights which may be claimed under it, the more liberal interpretation is to be preferred. It is important that our standard of international justice be so high that we be respected by our dependent Indian nations as to our own conduct and by independent nations as respects the precedents we set for international law. Furthermore, the opinion below conflicts with earlier cases in the Court of Claims as to the effect of similar Indian treaties by which the United States purchased rights of way across Indian lands. The conflict is compelling when the fact is considered that the court below is the only court passing in the first instance on claims of Indian tribes against the United States.

Furthermore, the decision is contrary to the rule laid down by this Court as to the policy of the United States with reference to the Indian title to lands acquired from Mexico. It also fails to observe the accepted rule of international law that even a treaty of "peace and amity"—barring express stipulation to the contrary—between nations necessarily implies a recognition by each of the territorial integrity of, and right to the territory occupied by, the other.

Finally, the court below has sought to exalt the breach sued upon into proof that there was no contract.

1. The opinion below, in the light of settled decisions of this Court, plainly misconstrues the treaty upon which suit is founded.

A. The treaty sets forth, when read with the other treaties of which it is a part, the boundaries of the land claimed by petitioners.[12] The Eastern Shoshone Treaty

[12] This is conveniently shown on the map prepared by the General Land Office lodged with the Clerk of this Court, as an original exhibit (Plaintiff's Exhibit 5), and referred to in the opinion below, R. 74.

(Fdg. 9, 41), incorporated as a part of petitioners' treaty, states that the parties "understood the boundaries of the Shoshone country, as defined and described by said nation" were as described therein. Other treaties of the series used similar expressions (R. 46, 48, 50-51).

This Court—as well as the court below—on the two occasions it had occasion to look at the Eastern Shoshone treaty (Treaty of Ft. Bridger, July 2, 1863, 18 Stat. 685, R. 40) read it as one creating a reservation for that division of the Shoshone Nation. *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, 485, reversing 82 C. Cls. 23, 26; same case, 304 U. S. 111, 113, reversing 85 C. Cls. 331, 335.[13] While the question was not, in that case, before this Court as now presented, it is significant that as opposed to the narrow reading of the treaty indulged below, this Court read the treaty as one acknowledging the territorial rights of the Indians.

Apart from incorporating the provisions of the Eastern Shoshone treaty, the Northwestern Shoshone treaty expressly provided:

> "*Article* IV. The country claimed by Pokatello, for himself and his people, is bounded on the west by Raft River and on the east by the Porteneuf Mountains."

The word "claim" as used in Indian treaties, is a word of art which means Indian title. It has been so used throughout the treaties of respondent with its Indian wards, dozens of which treaties are listed in the appendix. Historically in our frontier country it sprang up as the symbol by which Indian title was known, in the same way as it

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[13] In the latter case this Court stated, *op. cit.*, "The findings show: The United States, by the treaty of July 2, 1863, set apart for the Shoshone Tribe a reservation • • • " The reference in the earlier case is similar, pointing out that the *reservation* (set apart by the 1863 treaty) was ceded by the later Treaty of July 3, 1868, 15 Stat. 619, directly in suit in the cases cited.

denominated the title of a miner to his property or as the word "fee" came to denominate a certain title in Anglo-Saxon law. (See Appendix.) It was so used in the present case. Certainly no treaty was needed for the mere purpose of petitioners *asserting* their claims; they had already done that. The court below, however, restricts the meaning of the word to that of an unrecognized assertion or pretension of a right. Counsel have found no instance in any other case where such word in an Indian treaty has been so restrictively used or interpreted.

B. Review of the lower court's interpretation of the treaty sued upon is not foreclosed by its purported finding as a "fact" (Fdg. 15, R. 55; Fdg. 21, R. 58) that the treaties with the Shoshones did not acknowledge any right or title to the Indians to their territory. This is not a "fact" to be found by the court below, but a conclusion of law.[17]

To the extent that there was any evidence before the court below of facts which might bear upon this question of interpretation, all the facts show that an acknowledgment by the treaty of petitioners' title to their lands was intended.[18] Thus the commissioners who negotiated the Shoshone Treaties were specifically instructed *not* to negotiate the treaty "with a view to the extinguishment of the Indian title to the land" (Fdg. 6 at R. 34). They were also instructed to obtain from the Shoshones "a definite acknowledgment • • • of the boundaries of the entire country they claim" and "of the limits within which they will confine themselves" (Fdg. 6 at R. 34).

Administrative officials of the government and the legislative have persistently viewed the Treaty of Box Elder as one establishing petitioners' right to their lands. Thus,

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[17] *Jones* v. *Meehan*, 175 U. S. 1, 32, and cases cited.

[18] Those facts (except facts of which the court below and this Court take judicial notice) have been brought up with the record in this case.

shortly after the treaties with the Shoshones were executed, the Commissioner of Indian Affairs recommended with respect to the Indians in Utah (*Report Commr. Ind. Affs.*, 1863, pp. 37, 38) as follows:

> "* * * I respectfully recommend that measures be taken for the negotiation of further treaties with the Indians, having for their object the *extinguishment of their title to the soil,* and the setting apart of a suitable portion of the public domain upon which they may be concentrated, and so provided for that they need not be compelled to resort to plunder in order to sustain life." (Italics added.)

Congress, by Act of February 23, 1865, 13 Stat. 432, authorized the President to enter into treaties with the various tribes of Indians in Utah Territory to provide "for the absolute surrender to the United States, by said Indians, of their possessory right to all the agricultural and mineral lands in said territory except such agricultural lands as by said treaties may be set apart for reservations for said Indians" (Fdg. 22, R. 58-59). However, no treaty pursuant to this authority was entered into with petitioners, but only with the Eastern Shoshones (Fdg. 23, R. 59).

The Secretary of Interior in his report to the Attorney General on this case, which report was filed as evidence by the defendant, states that the territory of the Shoshones "was recognized by the United States as belonging to the various bands of Shoshone Indians by the treaties of July 2, 1863 (18 Stat. L., 685), July 30, 1863 (13 Stat. L., 663), October 1, 1863 (18 Stat. L., 689), and July 3, 1868 (15 Stat. L., 673)" (R. 84); again (R. 92) the "Government recognized all the land as belonging to the Northwestern bands of Shoshones." The Commissioner of the General Land Office in reporting to the Secretary of Interior referred to the land described in the Box Elder treaty as the "land in

the States of Utah and Nevada within the boundaries of the Shoshoni Indian Reservation (Northwestern Band), Treaty of July 30, 1863 (13 Stat. 663)" (R. 98).

C. Despite the protestations of the court below to the contrary (R. 75),[14] it is obvious that this restricted interpretation is contrary to this Court's direction that in the interpretation of an Indian treaty the words must be construed "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians" (*Jones* v. *Meehan*, 175 U. S. 1, 11-12); not "narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them" (*United States* v. *Shoshone Tribe of Indians*, 304 U. S. 111, 116). "To contend that the word 'allotted,' in reference to the lands guarantied to the Indians in certain treaties, indicates a favour conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." McLean, J., in *Worcester* v. *Georgia*, 6 Pet. 515, 582.[15]

Even as to international agreements the traditional view of American statesmen and jurists is that once we accept a treaty we are too self-respecting a nation to construe it

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[14] "The lady protests too much, methinks." Hamlet, Act iii, scene 2.

[15] *Kansas Indians*, 5 Wall. 737, 760. *United States* v. *Winans*, 198 U. S. 371, 380-381; *Seufert Bros. Co.* v. *United States*, 249 U. S. 194, 198; *Marlin* v. *Lewallen*, 276 U. S. 58, 64; *Northern Pacific Ry. Co.* v. *United States*, 227 U. S. 355, 366-367; *United States* v. *Payne*, 264 U. S. 446, 448-449.

narrowly because we have the power to enforce our decision.[16]

2. The holding of the court below that the treaty of July 30, 1863, did not constitute an acknowledgment or recognition of petitioners' Indian title to the lands enumerated is squarely in conflict with other decisions of that court permitting other tribes to recover for lands taken without tribal consent on the theory that the treaties there involved (substantially identical with the treaty in suit) did acknowledge Indian title. *Fort Berthold Indians* v. *United States*, 71 C. Cls. 308; *Assiniboine Indians* v. *United States*, 77 C. Cls. 347, *appeal dismissed cert. den.*, 292 U. S. 606; *Crow Nation* v. *United States*, 81 C. Cls. 238.

In the *Fort Berthold* case, the Arickarees, Gros Ventres,

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[16] Thus President Wilson in requesting the repeal of the law exempting coastwise American ships from Panama Canal tolls as contrary to a treaty with Great Britain said:

> "• • • We consented to the treaty; its language we accepted, if we did not originate; and we are too big, too powerful, too self-respecting a Nation to interpret with too strained or refined a reading the words of our own promises just because we have power enough to give us leave to read them as we please • • •" (51 Cong. Rec. 4346).

Senator Elihu Root in debate on the Hay-Pauncefote treaty on May 21, 1914, gave voice to the same theory:

> "• • • Whenever we seek to impose upon these words a narrower construction for our own interests than the makers of the treaty understood them to have, we should remember the fundamental rule of morals that a promisor is bound to keep a promise in the sense in which he had reason to believe the promisee understood it was made." (51 Cong. Rec. 8945).

This Court, per Stone J., has couched the same in judicial phraseology, as follows:

> "When a treaty provision fairly admits of two constructions, one restricting, the other enlarging the rights which may be claimed under it, the more liberal interpretation is to be preferred." (*Nielsen* v. *Johnson*, 279 U. S. 47, 51-2.)

See also *Factor* v. *Laubenheimer*, 290 U. S. 276, 293-294; *Asakura* v. *City of Seattle*, 265 U. S. 332, 342.

and Mandans Tribes of Indians sued the United States under a jurisdictional act which permitted the Court to determine the amount "due said tribes from the United States under *any treaties*, agreements, or laws of Congress," etc., for the value of lands taken from said tribes in violation of the treaty of September 17, 1851, 4 Kappler 1065, signed at Fort Laramie, Wyoming. By the terms of that treaty certain tribes of Indians agreed, as in the case at bar, that the United States and its citizens should have the right to establish roads, military and other posts through their country, and secured to the United States and its citizens the right to free passage through the same. Article 5 stipulated that the Indian nations, parties to the treaty, thereby recognized and acknowledged that certain described areas were their respective territories. Although the treaty contained no statement of tribal claim to such land as against the United States, nor any statement of recognition of this tribal ownership by the United States, the court held that the effect of the treaty was to recognize title and treat the lands described therein as reservations for the Indians, and that the United States was liable for any subsequent taking of the land involved. In so deciding, the Court stated:

> "• • • The defendant says the territorial provisions were simply mutual recognition by the Indians of their claims to territory and its segregation by them [as between the tribes signing the treaty], without positive governmental recognition or verification of the same. This contention, as we view it, concedes that when the commissioners approached the Indians their title by right of occupancy to all the territory embraced within the treaty was recognized by the commissioners representing the Government, and that what the treaty did was to segregate the same into individual tribal allotments. In other words, the Government not only recognized the Indian title, never at any time disputing

it, but by solemn treaty following negotiations, expressly agreed that each tribe was to be assured title to the territory set aside for it. *Surely it was not essential to procure by treaty the grant of a perpetual right of way through Indian lands if the Indians did not own the same by right of occupancy.* It is true the lands set aside to each tribe embraced a vast domain. To the plaintiff Indians the treaty segregated territory of about 21,000 square miles and embracing close to 13,000,000 acres of land. With this vast estate, however, the treaty deals, and whether the Government in ratifying the treaty was moved by the then nominal value of somewhat of a wilderness, or concerned in Indian peace at present costs, the fact is that the treaty was ratified in the manner provided by law * * * (p. 332).

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"The law, for which we need not cite familiar precedents, is that in controversies between the Indians and the Government arising out of doubtful and ambiguous provisions of treaties or contracts they are to be taken most strongly against the Government. The Indians' rights are not to be prejudiced by technical construction or words of doubtful import * * *" (p. 333). (Italics added.)

In *Assiniboine Indian Tribe* v. *United States*, 77 C. Cls. 347, 370-371, appeal dismissed and cert. denied, 292 U. S. 606, the plaintiff tribe brought suit under a similar jurisdictional act (permitting determination of claims arising under or growing out of the same Fort Laramie treaty) for lands described in the treaty and which were subsequently taken by the United States. The court again held for plaintiff, although the amount of offsets precluded any net recovery.

In *Crow Nation* v. *United States*, 81 C. Cls. 238, the court below, under a similar jurisdictional act (permitting suit on "any and all claims arising under or growing out of the treaty of Fort Laramie," etc.), arrived for the third time

at the same result, concluding the treaty "set aside a reservation of some 38 million acres to the Crow Nation" (p. 271).

The Shoshone Treaties of July 2 and July 30, 1863, the ones here sued upon, and the Fort Laramie Treaty of 1851, involved in the *Fort Berthold*, *Assiniboine*, and *Crow* cases, *supra*, were negotiated for precisely the same reasons and to attain the same ends. Abnormal increases in travel and constant trespass over Indian land, had provoked the Indians into the commission of depredations, and in each instance the United States sought by negotiating treaties to pacify them, identify their respective territories, secure the right of free and safe passage through their country, and to compensate them for such easements and for the extinction of game. Moreover, the treaties, in substance, carry the same reciprocal obligations and recognitions. Nevertheless, the court, under substantially identical jurisdictional acts, allowed recovery in the three cited cases, but denied recovery in the case at bar. There is no sound distinction between these cases.

3. The court below has plainly misconstrued both the treaty and the decision of this Court in *The United States as Guardian* v. *Santa Fe Pacific R. R. Co.*, 314 U. S. 339, as respects the lands derived from Mexico.

The court below took the definite view that the policy of this country, from at least 1852 to 1864, was against acknowledging "any possessory use or occupancy right, title or interest [of Indians within the territory acquired from Mexico] as against the United States to any specific lands for the reason that the United States in acquiring the territory from Mexico succeeded to all rights in the soil, possessory and otherwise, and the Government regarded itself as the absolute and unqualified owner" (R. 71). The court overlooked the fact that the senate would not have added

to petitioners' treaty a proviso (Art. IV) that nothing therein contained should be construed to admit of any greater title or interest in the lands than existed in the tribe under Mexican law if it did not regard the treaty as an acknowledgment of the rights of petitioners in their lands. The supposed policy, announced below, apparently lead the court to ignore the compelling inference from the amendment that, without the amendment all the lands, and with the amendment certainly the lands not acquired from Mexico, were acknowledged as properly belonging to petitioners. *Mid-Northern Oil Co.* v. *Walker*, 268 U. S. 45, 48; *Geofroy* v. *Riggs*, 133 U. S. 258, 269-270; *Market Co.* v. *Hoffman*, 101 U. S. 112, 115; *Wheaton* v. *Peters*, 8 Pet. 591, 661. But the supposed policy is not and has not been the policy of this government, as was recently determined by this Court in the *Santa Fe* case, *supra* (314 U. S. 339, 345). The decision below in this respect conflicts with the decision of this Court in the *Santa Fe* case.

4. In any event the court below failed to note that any treaty necessarily implies a recognition of the territorial integrity of the respective parties, even if it does not contain a delimitation of territory. It is to be remembered that Indian treaties are accorded the same status as international treaties. *The Cherokee Tobacco*, 11 Wall. 616, 621. International law has generally recognized that even a "treaty of peace and friendship" implies acknowledgment of the territorial integrity of the parties; and "The status existing at the time the treaty of peace was signed is, unless a contrary intention is clearly expressed, contemplated by the parties." *Crandall, Treaties, Their Making and Enforcement* (2d ed., 1916), § 159, p. 352. And this is only logical; for a treaty would not be entered into with a party as to whom the United States had no intention of conceding "A local habitation" as well as a name. A party would not

be recognized at all, let alone regarded as capable of contracting a treaty, if it has no lawful abode on this earth.[19] The treaty, therefore, recognizes that petitioners did have some proper home, a domain; and at the least the court below ought to have gone on to consider the lands of which petitioners were lawfully possessed at the time the treaty was entered into.

5. The court below found that "a vast area approximating 80,825,000 acres * * * was exclusively claimed by the Shoshone tribe and Bannock Indians as against other tribes," and that "their possession, occupancy, and use thereof was asserted by them to the exclusion of other tribes of Indians and was thus recognized generally by other separate Indian tribes" (Fdg. 1, R. 27). The court also found that the Eastern Shoshones "were located in the eastern portion of the territory inhabited or occupied by the Indians

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[19] 1 *Hackworth's Dig. Int. L.* §104, p. 725-726, cites the case of *German Continental Gas Co.* v. *Polish State*, IX Recueil des décisions des tribunaux arbitraux mixtes (1929-30), 336 346, translation. There it was urged Poland, though recognized, could not be considered as possessing Warsaw *de jure*, since it had belonged in law to Russia and had not been ceded to Poland. The German-Polish mixed arbitral tribunal, however, ruled:

> "But, whatever may be the importance of delimitation of frontiers, one cannot go so far as to contend that as long as this delimitation has not been juridically decided, the state in question cannot be considered as having any territory whatever. Here, also, the practice of international law and historical precedents indicate the contrary. In order that a state should exist and could be recognized as such with a territory without which it could not either exist or be recognized, it is sufficient that this territory should have a sufficiently certain consistency (even though its frontiers should not have been accurately delimited) and that, on this territory, the state should actually exercise national public authority in an independent manner. There are numerous examples of cases in which states have existed unquestionably, have been recognized and have been recognized mutually at a time when their frontier between them had not yet been accurately fixed. In this connection, it is unnecessary to recall the international arbitrations which have fixed the boundary between the Argentine Republic and Chile and the more recent one between Colombia and Venezuela, and one, could not draw therefrom the conclusion that before these delimitations the states in question had no territory."

of the Shoshone Nation" (Fdg. 9, at R. 42) and that petitioners "inhabited and occupied the territory west of the" Eastern Shoshones (Fdg. 10, R. 43).

The court below, however, denied recovery on the legal theory (Fdg. 21, R. 58) that the United States has ever "exercised dominion and complete ownership over the territory and land for which plaintiff bands now seek to recover compensation".[20] This theory is restated in the opinion below (R. 72-73) as follows: "The record shows and we have found as a fact that the United States has never recognized, either at the time the treaty of July 30 was made, or subsequently, a right of exclusive occupancy in plaintiff bands to the territory claimed by them but that it has ever exercised complete dominion over the territory, and this is one method, or manner, so far as the present authority the court to adjudicate is concerned, or extinguishing the Indian title. *United States, as Guardian* v. *Santa Fe Pacific R. R. Co., supra.*"

There is no basis upon which this so-called finding can be supported. Any theory that Indian title became extinguished *eo instanti* upon the acquisition of the Idaho land from Great Britain and the Utah and Nevada land from Mexico, has been rejected as a matter of law by a long line of decisions of this Court holding that Indian title survived United States ownership.[21] The argument that

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[20] The evidence in the record relied upon to show the exercise of complete dominion and ownership consists of grants of land within the area described in the treaties to railroad companies by Acts of July 1, 1862 (12 Stat. 489) and July 2, 1864 (13 Stat. 356), (R. 98-99), creation of national forest reserves by Presidential proclamations (R. 99), grants to the States of Idaho and Utah for school purposes (R. 100), etc.

[21] *Johnson* v. *M'Intosh*, 8 Wheat. 543, 574; *Worcester* v. *Georgia*, 6 Pet. 515, 547; *Mitchel* v. *United States*, 9 Pet. 711, 734; *Chouteau* v. *Molony*, 16 How. 203, 237; *Holden* v. *Joy*, 17 Wall. 211, 243-4; *United States* v. *Cook*, 19 Wall. 591, 592-3; *Buttz* v. *Northern Pac. R. Co.*, 119 U. S. 55, 67 *et seq.*; *Cramer* v. *United States*, 261 U. S. 219, 227; *United States* v. *Shoshone Tribe*, 304 U. S. 111, 117; *United States, as Guardian* v. *Santa Fe Pac. R. R. Co.*, 314 U. S. 339, 345-6.

because the United States exercised dominion over the lands it must have had no conscious thought of recognizing petitioners' title completely begs the question. The United States cannot by unilateral appropriation of the land either change the meaning of the treaties or destroy the rights of petitioners thereunder. *United States* v. *Creek Nation*, 295 U. S. 103, 110; *United States* v. *Shoshone Tribe*, 299 U. S. 476, 496-498; *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119, 123.

In this respect the opinion seeks to exalt the breach sued upon into proof that there never was any contract recognizing Indian ownership—an attempt by defendant to profit by its own wrong.

The decision below thus is based on a complete misapprehension as to the nature of tribal rights against the United States. Admitting that the United States can extinguish Indian title at any time, and that without a jurisdictional act the Indians can do nothing to protect themselves, it does not follow that the Indians are helpless when the matter becomes subject to the court's adjudication through waiver of defendant's political immunity by the granting of a jurisdictional act. *Id.* The court below has therefore manifestly misapplied this Court's decision in the *Santa Fe* and other cases.

Conclusion.

Petitioners seek a determination of their rights under their treaty with the United States in the courts of the United States—one of the parties to the treaty. The question is important not merely to petitioners; but its determination should aid in the solution of other outstanding claims of Indian tribes. The fair and proper determination of the questions is doubly important in this dark hour of history. A scrupulous observance of our treaties with our

conquered Indian tribes, freely interpreted by the highest court of the land with a jealous regard to their complete protection, should go a long way toward convincing a doubting world that a just settlement of grievances on the part of minorities can best be left to democracy.

The writ should be granted.

Respectfully submitted,

ERNEST L. WILKINSON,
JOSEPH CHEZ,
Attorneys for Petitioners.

JOHN W. CRAGUN,
Of Counsel.

APPENDIX.

Statutes Involved

Jurisdictional Act (Act of February 28, 1929, 45 Stat. 1407):

That jurisdiction be, and hereby is, conferred upon the Court of Claims, notwithstanding lapse of time or statutes of limitations, to hear, adjudicate, and render judgment in any and all claims which the northwestern bands of Shoshone Indians may have against the United States arising under or growing out of the treaty of July 2, 1863 (Eighteenth Statutes, page 685—2 Kappler, 848); treaty of July 30, 1863 (Thirteenth Statutes, page 863—2 Kappler, 850); Act of Congress approved December 15, 1874 (Eighteenth Statutes, page 291), and any subsequent treaty Act of Congress, or Executive order, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

SEC. 2. That any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of the approval of this Act; and such suit shall make the northwestern bands of Shoshone Indians party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claims under contract with the northwestern bands of Shoshone Indians, approved by the Commissioner of Indian Affairs and the Secretary of the Interior as provided by law. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys for said Indians to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said Indians.

SEC. 3. That in said suit the Court of Claims shall also hear, examine, consider, and adjudicate all claims which

the United States may have against the said northwestern bands of Shoshone Indians. Any payment which may have been made by the United States, including gratuities for the benefit of any band or bands of said Indians or for their support and civilization, shall not operate as an estoppel, but may be pleaded as a setoff in said suit.

SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act an appeal may be taken by either party, as in other cases, to the Supreme Court of the United States.

SEC. 5. The Court of Claims shall have full authority by proper process and orders to bring in and make parties to such suit any and all persons deemed by it necessary or proper to the final determination of the matters in controversy.

SEC. 6. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he or some attorney from the Department of Justice to be designated by him is hereby directed to appear and defend the interests of the United States in such case.

SEC. 7. Upon final determination of such suit or suits the Court of Claims shall have jurisdiction to fix and determine a reasonable fee, not to exceed 10 per centum of the recovery, together with all necessary and proper expenses incurred in preparation and prosecution of the suit, to be paid to the attorney or attorneys employed by said northwestern bands of Shoshone Indians, or any of them, and the same shall be included in the decree and shall be paid out of any sum or sums found to be due said bands.

SEC. 8. The balance of the proceeds of all amounts, if any, recovered for said northwestern bands of Shoshone Indians shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled thereto, and shall draw interest at the rate of 4 per centum per annum from the date of the judgment or decree and shall be subject to appropriation by Congress only for the health, education, and industrial advancement of said Indians.

Approved, February 28, 1929.

Indian Treaties Using the Word "Claim"

As between whites, the word "claim" has been broadly defined. Thus in *Southern Pac. R. Co.* v. *United States* (N.D. Cal., 1889), 38 Fed. 55, 56, Judge Sawyer stated—"The word 'claim', is very broad and comprehensive in its signification—quite as comprehensive as any of its synonyms—demand, pretension, right, privilege, title."

But in Indian land matters the word "claim" has taken on even a broader connotation. It was there a word of art. In its various inflections and tenses the word "claim" meant none other than Indian title, and was so used throughout the treaties of respondent with its Indian wards. It was there used to denominate the peculiar property of Indians in their land as the word "fee" is used in denominating property of the whites. Thus, where the United States has ceded its own lands to the Indians—in one instance conveying the lands "in fee simple"[22]—it later on in acquiring the lands by recession from the Indians, denominated the title of the Indians merely as a "claim" to the lands.[23] The word "claim" has apparently been regarded as comprehending more than an "interest" in land, as is evident from the contrasting use of these words in a cession by the Sac and Fox Indians to the United States, of "all lands • • • to which they have *any claim*, or

[22] Treaty with the Choctaws, September 27, 1830, 7 Stat. 333, 2 Kappler 310, Art. 2.

[23] Treaty with the Peorias, Sept. 25, 1818, 7 Stat. 181, 2 Kappler 165, Art. 5, ceding lands to the Peorias, with which compare Treaty with the Kaskaskia and Peoria, Oct. 27, 1832, 7 Stat. 403, 2 Kappler 376, Art. 3, in which the Peorias "cede and relinquish to the United States, *all their claims* to land heretofore reserved by, or assigned to them in former treaties • • •."

Treaty with the Choctaws, Sept. 27, 1830, 7 Stat. 333, 2 Kappler 310, Art. 2, conveying to the Choctaws "in fee simple" certain country west of the Mississippi, with which compare Treaty with the Choctaws and Chickasaws, June 22, 1855, 11 Stat. 611, 2 Kappler 706 (preamble, par. 2), wherein the Choctaws relinquished "*all claim*" to a part of the territory.

See also Treaty with the Creeks, Jan. 24, 1826, 7 Stat. 286, 2 Kappler 264, Art. 1, and treaty referred to therein.

title, or in which they have *any interest whatever.*"[24] And the word "claim" has been contrasted with the concept of the court below, in the situation where the Indians cede the lands they "claim" and in addition those to which they "pretend to have any claim."[25] That "claim" means Indian ownership to the Indians is shown by treaties in which the Indians ceded lands "occupied and claimed by them," retaining the right to reside on ground in the ceded area "not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant"[26]—the ownership of the whites thus being described in words the exact equivalent of those used to describe the title of the Indians.

The Indians frequently have ceded their lands in terms of "all their claim";[27] "all claim whatever";[28] "all claim";[29] and "claim of any kind whatsoever."[30] It has been expressed that the Indians were receiving payment for "country claimed by them";[31] or that particular boundaries encompassed land "claimed by them";[32] or that the

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[24] Treaty with Sac and Fox, October 11, 1842, 7 Stat. 596, 2 Kappler 546, Art. 1.

[25] Treaty with the Otoe and Missouri, Sept. 21, 1833, 7 Stat. 429, 2 Kappler 400, Art. 1, in which the language was a cession of lands south of a line "running in a due west line as far west, as said Otes and Missourias, *have, or pretend to have any claim.*"

[26] Treaty with the Yakima, June 9, 1855, 12 Stat. 951, 2 Kappler 698, Arts. 1 and 2. Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957, 2 Kappler 702, Arts. 1 and 2.

[27] Treaty with the Miami, Oct. 23, 1826, 7 Stat. 300, 2 Kappler 278, Art. 1. Treaty with the Kaskaskia and Peoria, Oct. 27, 1832, 7 Stat. 403, 2 Kappler 376, Art. 3.

[28] Treaty with the Delawares, Sept. 24, 1829, 7 Stat. 327, 2 Kappler 304.

[29] Treaty with the Seminoles, May 9, 1832, 7 Stat. 368, 2 Kappler 344, Art. 1. Treaty with the Seneca, Nov. 5, 1857, 11 Stat. 735, 12 Stat. 991, 2 Kappler 767, Art. 1.

[30] Treaty with the Potawatomi, June 5 and 17, 1846, 9 Stat. 853, 2 Kappler 557.

[31] Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963, 2 Kappler 714, Art. 1.

[32] Treaty with the Molala, Dec. 21, 1855, 12 Stat. 981, 2 Kappler 740, Art. 1.

cession was of "all their claim to land" [33] or of "all claim" to certain territory; [34] or that they were conveying "all the country claimed by them." [35]

Thus, too, the cession has been of the lands "claimed and owned," [36] "owned and claimed," [37] or "owned *or* claimed." [38] Sometimes it has been expressed as a cession of lands and country "occupied and claimed," [39] or "occupied *or* claimed." [40] Some treaties recognized, as to Indians not parties to the treaty, that they might have title to some of the lands ceded, by providing that if such bands "residing in and claiming" any portion of the country ceded should not become parties to the treaty, then the consideration should be proportionately adjusted in accordance with the whole number of Indians "residing in and claiming the entire country." [41] The lands are spoken of as being "owned, claimed *or* possessed," [42] "owned, pos-

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[33] Treaty with the Delawares, Oct. 3, 1818, 7 Stat. 188, 2 Kappler 170.

[34] Treaty with the Choctaws and Chickasaws, June 22, 1855, 11 Stat. 611, 2 Kappler 706, preamble.

[35] Treaty with the Klamath, Oct. 14, 1864, 16 Stat. 707, 2 Kappler 865, Art. 1. Treaty with the Tribes of Middle Oregon, *supra* note 17.

[36] Treaty with the Wea, Oct. 2, 1818, 7 Stat. 186, 2 Kappler 169, Art. 1.

[37] Treaty with the Chippewa, Feb. 22, 1855, 10 Stat. 1165, 2 Kappler 685, Art. 1; Treaty with the Chippewa, Red Lake and Pembina Bands, Oct. 2, 1863, 13 Stat. 667, 2 Kappler 853, Art. 2.

[38] Treaty with the Pawnee, Sept. 24, 1857, 11 Stat. 729, 2 Kappler 764, Art. 1; Treaty with the Creeks, Aug. 7, 1856, 11 Stat. 699, 2 Kappler 756, Art. 5; Treaty with the Ponca, Mar. 12, 1858, 12 Stat. 997, 2 Kappler 772, Art. 1.

[39] Treaty with the Yakima, June 9, 1855, 12 Stat. 951, 2 Kappler 698, Art. 1.

[40] Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957, 2 Kappler 702, Art. 1; Treaty with the Flatheads, July 16, 1855, 12 Stat. 975, 2 Kappler 722, Art. 1.

[41] Treaty with the Wallawalla, June 9, 1855, 12 Stat. 945, 2 Kappler 694, Arts. 1 and 2; Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963, 2 Kappler 714, Art. 1.

[42] Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478, 2 Kappler 439, Art. 1.

sessed, or claimed,"[43] or "claimed, held, or possesed."[44]

The words of grant themselves have not been limited to the traditional "right, title and interest" of the draftsman of deeds. Thus, the cession has been expressed to be of "all their title and claim,"[45] or "title or claim,"[46] or "all claim or title,"[47] or "all interest or claim,"[48] or "all their right, claim, and title,"[49] or "all their claim, interest and title,"[50] or "all their right, title and claim,"[51] or "all

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[43] Treaty with the Yankton Sioux, Apr. 19, 1858, 11 Stat. 743, 2 Kappler, 776, Art. 1; Treaty with the Arapaho and Cheyenne, Feb. 18, 1861, 12 Stat. 1163, 2 Kappler 807, Art. 1.

[44] Treaty with the Chippewa, Bois Fort Band, Apr. 7, 1866, 14 Stat. 765, 2 Kappler 916, Art. 2.

[45] Treaty with the Choctaw, Oct. 24, 1816, 7 Stat. 152, 2 Kappler 137, Art. 1.

[46] Treaty with the Creeks, Feb. 12, 1825, 7 Stat. 237, 2 Kappler 214, Art. 1; Treaty with the Kansas, June 3, 1825, 7 Stat. 244, 2 Kappler 222, Art. 1; Treaty with the Winnebago, Sept. 15, 1832, 7 Stat. 370, 2 Kappler 345, Art. 1; Treaty with the Sac and Fox, Sept. 21, 1832, 7 Stat. 374, 2 Kappler 349, Art. 1.

[47] Treaty with the Chickasaw, Oct. 19, 1818, 7 Stat. 192, 2 Kappler 174, Art. 2; Treaty with the Florida Tribes of Indians, Sept. 18, 1823, 7 Stat. 224, 2 Kappler 203, Art. 1; Treaty with the Quapaw, Nov. 15, 1824, 7 Stat. 232, 2 Kappler 210, Art. 1.

[48] Treaty with the Iowa, Oct. 19, 1838, 7 Stat. 568, 2 Kappler 518, Art. 1, ¶ 1 (see ¶ 2).

[49] Treaty with the Ottawa, Aug. 24, 1816, 7 Stat. 146, 2 Kappler 132, Art. 1.

[50] Treaty with the Shawnee, Nov. 7, 1825, 7 Stat. 284, 2 Kappler 262, Art. 1.

[51] Treaty with the Miami, Feb. 11, 1828, 7 Stat. 309, 2 Kappler 286, Art. 1; Treaty with the Winnebago, Aug. 1, 1829, 7 Stat. 323, 2 Kappler 300, Art. 1; Treaty with the Sioux, Aug. 5, 1851, 10 Stat. 954, 2 Kappler 591, Art. 2; Treaty with the Kalapuya, Jan. 22, 1855, 10 Stat. 1143, 2 Kappler 665, Art. 1; Treaty with the Wallawalla, June 9, 1855, 12 Stat. 945, 2 Kappler 694, Art. 1; Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963, 2 Kappler 714; Treaty with the Klamath, Oct. 14, 1864, 16 Stat. 707, 2 Kappler 865, Art. 1; Treaty with the Chippewa, Apr. 7, 1866, 14 Stat. 765, 2 Kappler 916, Art. 2.

right, title, interest and claim,"[52] or "all of their claims, right, title, and interest,"[53] or "all their right, title, interest, claim, and privilege."[54]

Uniformly in Indian treaties, by use of the word "claim," the parties have understood that the Indians conveyed something more than the release of a mere assertion of some undefined interest; for in such cases, the treaties speak of the "land herein conveyed." And despite the fact that a "claim" to land as conveyed to the United States, the Indians nevertheless frequently made reservations in the treaty of conveyance, where they were retaining some part of their old lands (instead of removing to new ones).[55] In such a situation we know of no case in which respondent has ever made the objection or a court has found that the reservation retained was not in fact owned. Indeed the present case, so far as counsel for petitioners have been able to determine, is the first case, in any situation, where it has been contended or held that the word "claim" in an Indian treaty does not connote the Indian right of use and occupancy.

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[52] Treaty with the Iowa, Aug. 4, 1824, 7 Stat. 231, 2 Kappler 208, Art. 1; Treaty with the Osage, June 2, 1825, 7 Stat. 240, 2 Kappler 217, Art. 1; Treaty with the Cherokee, Aug. 6, 1846, 9 Stat. 871, 2 Kappler 561, Art. 4; Treaty with the Umpqua, Sept. 19, 1853, 10 Stat. 1027, 2 Kappler 606, Art. 1; Treaty with the Molala, Dec. 21, 1855, 12 Stat. 981, 2 Kappler 740, Art. 1; Treaty with the Rogue River Tribe, Sept. 10, 1853, 10 Stat. 1018, 2 Kappler 603, Art. 1.

[53] Treaty with the Utah-Tabeguache Band, Oct. 7, 1863, 13 Stat. 673, 2 Kappler 856, Art. 2, which as this Court said "must be viewed as giving the Band a country—limited by reservation boundaries—never before possessed by this Band." *Hayt* v. *United States*, 38 C. Cls. 455, 464.

[54] Treaty with the Winnebago, Oct. 13, 1846, 9 Stat. 878, 2 Kappler 565, Art. 2.

[55] See *e. g.*, Treaty with the Miami, Oct. 23, 1826, 7 Stat. 300, 2 Kappler 278; Treaty with the Yakima, June 9, 1855, 12 Stat. 951, 2 Kappler 698, Art. 2; Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957, 2 Kappler 702, Art. 2.

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Supreme Court of the United States

OCTOBER TERM, 1944

No. 63

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,

Petitioners,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONERS

ERNEST L. WILKINSON,
JOSEPH CHEZ,
Attorneys for Petitioners.

JOHN W. CRAGUN,
HERMAN J. GALLOWAY,
FRANK K. NEBEKER,
CHARLES J. KAPPLER,
CLINTON D. VERNON,
Of Counsel

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Supreme Court of the United States

OCTOBER TERM, 1944

No. 63

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,
Petitioners,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONERS

OPINIONS BELOW

The first opinion of the Court of Claims is reported in 95 C. Cls. 642, and appears at R. 26; the second opinion is reported in 100 C. Cls. 455, and appears at R. 77.

JURISDICTION

The judgment of the Court of Claims was entered January 3, 1944 (R. 79). The jurisdiction of this Court is invoked under § 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, Title 28, U. S. C., § 288, as amended by the Act of May 22, 1939, c. 140. 53, Stat. 752, and the Act of February 28, 1929, c. 377, 45 Stat. 1407, § 4, Appendix, p. 1, the latter being the special jurisdic-

tional act under which this suit was instituted in the court below.[1] The time within which the petition for writ of certorari could be filed was extended for 60 days from April 3, 1944, by the Chief Justice of the United States on March 13, 1944 (R. 115). The writ was granted May 29, 1944 (R. 115).

QUESTIONS PRESENTED

1. Whether the United States by the treaty of July 30, 1863, 13 Stat. 663, and related treaties,[2] acknowledged or recognized petitioners' Indian title to the lands therein described and identified.

2. Whether, in any event, the United States by the same treaties acknowledged or recognized petitioners' Indian title to the lands as to which petitioners had exclusive right of use and occupancy at the time of the treaty.

3. Whether the policy of the United States has been opposed to the acknowledgment or recognition of the In-

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[1]The special jurisdictional act provides, *op. cit.*, that from the decision below "an appeal may be taken by either party, as in other cases, to the Supreme Court of the United States." Notwithstanding this statute was enacted subsequent to the Act of February 13, 1925, cited in the text, it is believed that certiorari and not appeal is the proper mode of review. See *Robertson & Kirkham* (1936), *Jurisdiction Sup. Ct. U. S.*, § 219, p. 376, note 47, citing *Klamath & Moadoc Tribes of Indians* v. *United States*, 296 U. S. 244, 245-6.

[2]Treaty of July 2, 1863, with the Eastern Shoshones, 18 Stat 685 (R. 51); Treaty of October 1, 1863, with the Western Shoshones, 18 Stat. 689 (R. 55); Treaty of October 12, 1863, with the Shoshonee-Goship Bands, 13 Stat. 681 (R. 22); Treaty of October 14, 1863, with the Mixed Bands of Bannocks and Shoshonees, 5 Kappler 693 (R. 60).

dian title to lands within the territory acquired by the United States from Mexico.

TREATIES AND STATUTES INVOLVED

The treaties as negotiated appear in the record (R. 40-51), as well as a Senate amendment to four of them (R. 57). The jurisdictional act under which this suit was instituted (Act of February 28, 1929, c. 377, 45 Stat. 1407) and the statutes authorizing treaties with petitioners are set forth in the appendix (pp. 1-4).

STATEMENT[3]

This suit was brought by the Northwestern Bands of Shoshone Indians (one of five divisions of the Shoshone Nation) to recover damages for the taking by respondent, without petitioners' consent, of all of their ancestral lands located in Southern Idaho, Northern Utah, and Northeastern Nevada. The special jurisdictional act (c. 377, 45 Stat. 1407, Appendix, p. 1) under which the suit was brought, specifically authorized the Court of Claims to render judgment on "any and all claims * * * arising under or growing out of the treaty of July 2, 1863 * * * treaty of July 30, 1863 * * * and any subsequent treaty, Act of Congress or Executive Order", etc. Petitioner alleged that by the treaty of July 30, 1863, and related treaties, respond-

[3]References in this brief to the annual reports of the Commissioner of Indian Affairs are to the individual volumes—not to such reports, differently paged, as combined in the annual reports of the Secretary of the Interior. For the convenience of the Court, extracts from the reports are reproduced in petitioners' Appendix, filed herewith.

ent recognized petitioners' title to the lands herein involved and that the subsequent taking of such land by defendant was in derogation of petitioner's title thus recognized.

The court below held against petitioners on the theory that defendant did not, by these treaties, acknowledge or recognize petitioners' Indian title and that the claim did not therefore arise under or grow out of the enumerated treaties.

In detail the facts upon which petitioners' case is predicated are as follows:

Facts leading up to Shoshone Treaties. Until about 1850 relations between the Shoshones and the whites were peaceful and harmonious. The heroic and unusual assistance given by members of the Shoshone Nation to the Lewis & Clark Expedition, which was largely responsible for our retention and subsequent colonization of the territory now embraced within the States of Washington, Oregon, Idaho and Wyoming, has been credited with making the expedition a success.[4] The early Indian agents and superintendents who were sent among the Shoshone Indians reported that they were "an honest and sober people,

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[4]The successful accomplishment of the mission entrusted to this expedition by President Jefferson, resulted, it has been said, in "the greatest real estate transaction ever recorded in history". *Olden, S. E., Shoshone Folk Lore* (1923), pp. 14-16. Chief credit for its success has been given to Sacajawea a young Shoshone woman who served as principal guide and interpreter. A band of Shoshones under Chief Cameawat provided horses and other guides. *Olden, Shoshone Folk Lore* (1923), *supra; Brown, J. B., Fort Hall on the Oregon Trail* (1904), pp. 35-37; *R. G. Thwaites, Original Journals of the Lewis and Clark Expedition* (1904), Vol. 2, chaps. XIV and XV, vol. 3, chap. VI; *Hebard, G. R., Washakie* (1930), pp. 25-28.

decidedly,"[5] "uniformly"[6] and "remarkably" friendly to the whites.[7] They were also friendly at all times with the Government of the United States, the Shoshone Tribe, as such, never having at any time, engaged in war with the United States (R. 28).

The whites, however, failed to reciprocate this same helpful attitude. Instead they drove away the sparse game supply and largely destroyed the scant supply of edible vegetation upon which the Shoshones depended for their subsistence. The latter, thus reduced to practical starvation, were forced to "steal or starve" (R. 29).

The gold discoveries in California, Oregon, Nevada, Idaho and Montana in the years 1849 to 1863 greatly stimulated travel over the several routes which passed through the country claimed by the Shoshones.[8] During the first six months of 1850 more than 40,000 persons passed Fort Laramie in Wyoming on their way to the Pacific Coast,[9] during 1863 between 25,000 and 30,000 persons traversed Shoshone territory en route to the Boise

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[5]Letter of Agent John Wilson, Ann. Rep. Commr. Ind Affs. for 1849, p. 68, p. 70, Appendix p. 7.

[6]Letter of Agent J. H. Holeman, Ann. Rep. Commr. Ind. Affs. for 1851, p. 182, p. 183, Appendix p. 10.

[7]Report of Agent Holeman, Ann. Rep. Commr. Ind. Affs. for 1852, p. 151; appendix p. 13. See also Ann. Reps. of Commr. Ind. Affs. for 1853, p. 444, and 1858, pp. 209, 210; and *Hebard, G. R., Washakie* (1930), pp. 30, 31, 41.

[8]*Bancroft, H. H., Works* (1890), vol. 31 (Washington, Idaho and Montana), pp. 406-442, 611-618; vol. 25 (Nevada, Colorado and Wyoming), pp. 92-120, 224-231, 694-705.

[9]*Brown, J. G., Fort Hall on the Oregon Trail* (1904), p. 308.

mines in northern Idaho.[10] At about the same time, stage coach lines were established, and by 1861 telegraph and overland daily mail lines were being operated through Shoshone country.[11]

This gold-seeking immigration and the ensuing communications and transportation developments proceeded in advance of any arrangements with the Indians of the far west and in utter disregard of their rights.[12] It aroused resentment and hostility, resulting in some instances, in certain bands of petitioner Indians, encouraged by unscrupulous whites, in committing depredations upon emigrant trains (R. 32). This situation made it imperative that respondent make some arrangements whereby white emigrants would be permitted to travel and the Government to maintain the communication system over the lands claimed by the Shoshones (R. 32).

As early as 1849, Indian agents and superintendents recommended that the United States negotiate treaties with the Shoshone Indians which would secure for the whites the right to traverse Shoshone country,[13] and thereby establish peace. In 1851, a delegation of 60 Shoshone chiefs and headmen were invited and taken to Fort Laramie, Wyoming, by agents of respondent, where, along with the

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[10] *Bancroft, op. cit.*, vol. 31, pp. 413, 427. In 1852 Indian Agent J. H. Holeman reported that while travelling for a distance of approximately 400 miles along the Emigrant Road in Nevada and Utah he passed on an average of about 300 wagons a day. Ann. Rep. Commr. Ind. Affrs. for 1852, pp. 10, 152, quoted in appendix, p. 13.

[11] *Brown, J. G., Fort Hall on the Oregon Trail* (1904), p. 345; *Bancroft, op. cit.*, vol. 25, p. 230; Ann. Rep. Commr. Ind. Affs. 1861, p. 135, quoted in appendix, p. 16.

[12] *Manypenny, Our Indian Wards* (1880), p. 181.

[13] Ann. Rep. Commr. Ind. Affs. 1849, pp. 66-68, quoted in the appendix, pp. 5-8; see also R. 32.

Fort Berthold (Gros Ventres, Arrickarees, and Mandans), Sioux, Cheyenne, Arapahoe, Crow, and Assiniboine tribes, they attended a treaty council to negotiate a treaty with the United States. The United States Commissioners, however, doubted whether their instructions authorized the inclusion of the Shoshone Nation.[14] Consequently the treaty which was concluded at Fort Laramie[15] while it included the other tribes above named, did not include the Shoshone Nation.[16]

In 1859, the Surveyor General of the Territory of Utah urged that before any additional surveys of land were undertaken, the "Indian title" should be extinguished.[17] In 1861 the Commissioner of Indian Affairs recommended that a treaty be negotiated with the Shoshone Indians which would grant to them "annuities in consideration of a right-of-way across their country." [18] In the same year the Superintend-

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[14]Ann. Rep. Commr. Ind. Affairs, 1851, Exec. Doc. No. 2, 32d Cong. 1st Sess., p. 445, quoted in Appendix, p. 10.

[15]4 Kappler 1065.

[16]Certain of the lands described in the Fort Laramie treaty were later taken by the United States, as a result of which the Indian tribes concerned recovered judgments against the United States on the ground that such treaty acknowledged and recognized their title to such lands. (*Fort Berthold Indians* v. *United States*, 71 C. Cls. 308, 331-332; *Assiniboine Indian Tribe* v. *United States*, 77 C. Cls. 347, 370-371, appeal dismissed and certiorari denied 292 U. S. 606; *Crow Nation* v. *United States*, 81 C. Cls. 238).

[17]Letter of October 6, 1859 from S. C. Stambaugh, Surveyor General of the Territory of Utah, to Commissioner General Land Office, Ann. Rep. Commr. G. L. O. 1859, pp. 199-204.

[18]Ann. Rep. Commr. Ind. Affs. 1861, p. 25 (p. 642 in Report of Secretary of the Interior for 1861), Appendix p. 15, as follows:

> "The Shoshones, or Snakes, and the Flatheads, are wealthy and powerful, and can cause their hostility to the remote settlers and the overland immigration to be

ent of Indian Affairs for the Territory of Utah (later one of the treaty commissioners), recommended negotiation of a treaty whereby the Shoshones would "cede to the United States *all the lands they claim* in this Territory" except certain reservations (R. 31).

On February 26, 1862, the Secretary of the Interior, in reporting on a resolution of the House of Representatives instructing its Committee on Indian Affairs to "inquire into the expediency of making an appropriation to defray the expenses of holding treaties with the Indians in Utah, with a view to the purchase of their lands", acknowledged that the land was "owned by the Indians" but reported that very little of it would "be required for settlement for many years." Accordingly, he did not recommend a purchase of the lands. The Committee on Indian Affairs thereupon recommended to Congress that it negotiate a treaty not for the purchase, but for passageways over the land claimed by the Shoshones.[19]

On July 5, 1862 (12 Stat. 512, 529) Congress authorized the appointment of a treaty commission to negotiate

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severely felt. Hence, the pressing necessity of some speedy arrangement with them, which with the Snakes it is suggested should be (as a temporary measure) a treaty granting annuities in consideration of a right-of-way across their country."

[19] When the resolution authorizing an appropriation of $20,000 for the negotiation of a treaty was before the Senate, Senator James W. Nesmith of Oregon explained: "They [the Shoshone Indians] say now that if the Government will make them some presents, they are willing to come to terms and permit our people to pass and repass through their country without interruption; and that is the object for which this amendment is incorporated in the bill." "The object of this amendment, as I understand, is not for the purpose of making a treaty that contemplates the purchase of any land." *Cong. Globe*, 37th Cong., 2d Sess., p. 2092.

such a treaty (R. 32). The President appointed James Duane Doty[20] Superintendent of Indian Affairs and later Governor of the Territory of Utah, Luther Mann, Indian Agent in the same Territory, and Henry Martin, Esq., a former Superintendent of Indian Affairs for the Territory of Utah, as Treaty Commissioners.

Pursuant to the Act of July 5, 1862, the Commissioner of Indian Affairs instructed the special commission appointed to treat with the Shoshones, *inter alia* (R. 34):

> "It is not expected that the treaty will be *negotiated with a view to the extinguishment of the Indian title to the land*, but it is believed that with the assurances you are authorized to make of the amicable relations which the United States desires to establish and perpetuate with them, and by the payment of Twenty thousand dollars of annuities in such articles as by the President may be deemed suitable to

[20]Superintendent Doty had been appointed by President Lincoln to take charge of Indian affairs in the Territory of Utah late in 1861, and he continued to serve in that capacity until 1864. In 1863 he was appointed Governor of the Territory, which position he held until his death in 1865. He was a lawyer, judge and statesman who was on terms of friendship with many of the most eminent men of his day, and had held positions in state and national councils, having been a member of the Michigan Legislature and a delegate and later a Representative in Congress from the State of Wisconsin. The comments of Senators Doolittle and Wilkinson on the floor of the Senate on Feb. 25, 1863, are indicative of the high esteem in which Supt. Doty was held. Supt. Doty was praised highly for his ability and integrity and referred to as a very able man who had no superior. *Cong. Globe*, 37th Cong. 3d Sess., pp. 1281-1282. (See also Ann. Rep. Commr. Ind. Affs. 1863, p. 418.) During the period of time he was Superintendent of Indian Affairs in Utah, he traveled among the Shoshone Indians and became familiar with their country and conditions. (Ann. Reps. Commr. Ind. Affs. 1863, pp. 395-396, 420, appendix pp. 20-24; 1864, 174-176, appendix pp. 26-29).

> their wants for which you are authorized to stipulate, you will be enabled to procure from them such articles of agreement as will render the routes indicated secure for travel and free from molestation; *also a definite acknowledgment as well of the* ***boundaries of the entire country they claim as of the limits within which they will confine themselves,*** which limits it is hardly necessary to state should be as remote from said routes as practicable." (Italics added.)

The Shoshone Treaties. The above instructions contemplated the making of one treaty with the entire Shoshone Nation. The treaty commissioners, however, finding it impossible to assemble the entire Shoshone Nation together at one time (R. 39) met separately with each of its five divisions (R. 39), and negotiated five separate treaties, each succeeding treaty either substantially repeating or incorporating the provisions of the prior treaties (R. 40-51).

They met first with the Eastern Shoshones at Ft. Bridger, Wyoming, where they negotiated the treaty of July 2, 1863, 18 Stat. 685 (R. 40). By this treaty the parties mutually agreed that a "firm and perpetual peace shall be henceforth maintained between the Shoshonee nation and the United States" (Art. I, R. 40). The Shoshones on their part agreed that routes of travel through "Shoshonee country" should remain forever free and safe for the use of the United States "and of all emigrants and travellers under its authority and protection"; that the United States may establish military agricultural settlements and military posts" along said routes, maintain ferries over rivers wherever required, erect houses and settlements at such points in such country "as may be necessary

for the comfort and convenience of travellers" (Art. II, R. 40), operate and maintain "telegraph and overland stage lines" which were already "operated through a part of Shoshonee country", and operate a transcontinental railway "through any portion of the country claimed by" the Shoshones (Art. III, R. 40-41). It described and set forth the northern, eastern, and southern boundaries of the Shoshone country, as defined and described by said nation (Art. IV, R. 41), but left the "western boundary * * * undefined" since there were no "Shoshones from that district of country present." The United States on its part "in consequence of the driving away and destruction of game along the routes travelled by whites, and by the formation of agricultural and mining settlements * * * and the rights and privileges" conceded by the Shoshonee, agreed to pay the sum of $200,000 in twenty annual installments of $10,000 each (Art. V, R. 41).

On July 30, 1863, the commissioners met with the Northwestern Bands of Shoshone Indians (the present petitioners),[21] and concluded a treaty (13 Stat. 663) at Box Elder, Utah. This treaty, which also declared for a perpetual peace (Art. I, R. 43), incorporated by express reference and adoption all the provisions of the Ft. Bridger treaty (Art. II, R. 43). The petitioner Indians thereby granted the same rights of way and easements over their lands as were granted by the Eastern Shoshones over the land described in their treaty. The Box Elder treaty did not purport to describe the land of all the Northwestern Shoshone bands but did describe the "country claimed by Pokatello [a chief of petitioner Indians] for himself and

[21] This treaty will hereafter be referred to either as the Northwestern Shoshone Treaty, or the Treaty of Box Elder.

his people," as being bounded on the west by Raft River and on the east by Porteneuf Mountains (Art. IV, R. 44). The United States, on its part, agreed to increase the twenty year annuity of $10,000 provided in the Eastern Shoshone treaty to $15,000 (Art. III, R. 43-4).

Like treaties were entered into with the Western Shoshones on October 1, 1863 (18 Stat. 689, R. 44-47), the Shoshonee-Goship Bands on October 12, 1863 (13 Stat. 681, R. 47-49), and the Mixed Bands of Bannacks and Shoshonees on October 14, 1863 (5 Kappler 693, R. 49-51), which together with the Eastern and Northwestern Shoshones constitute the entire Shoshone Nation. The successive treaties either repeated substantially the undertakings of the Ft. Bridger treaty or incorporated it and the intervening treaties by reference.[22] The twenty-year annuity, already increased to $15,000, was increased in the aggregate to $21,000. Apparently all of the various chiefs were illiterate, since they indicated their assent to the respective treaties by mark.[23]

The complete boundaries of the Northwestern Shoshone lands are determined by collocation of the territorial descriptions set forth in the five treaties. These boundaries are also set forth on a map prepared by Governor Doty, Chairman of the Treaty Commissioners, showing the ex-

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[22]Northwestern Shoshone Treaty, Art. II, R. 43; Western Shoshone Treaty, Arts. II-III, R. 45; Shoshonee-Goship Treaty, Arts. II-III, R. 48; Mixed Bands Treaty, Art. II, R. 50.

[23]The nine chiefs who thus gave their assent were Pokatello, Toomontso, Sanpitz, Tosowitz, Yohnoway, Weeraksoop, Pahragoosahd, Tahkwetoonah and Omashee. For names of chiefs assenting to all treaties and a reproduction of their marks see 18 Stat. 685-7, 13 Stat. 663-4, 13 Stat. 681, 682, 18 Stat. 689, 691, and Vol. 59 *Confidential Documents [Regular Series] United States Senate*, 38th, 39th Congress, pp. 111-2.

terior boundaries of the Shoshone Nation and the lines of the country occupied and claimed by each of the five different divisions of the Shoshone Nation, as set forth in the five various treaties (R. 51, 54, 55). This map accompanied the treaties when they were sent to the Senate for ratification (R. 57, 100-101). In 1939, the General Land Office prepared a large map based on the descriptions set forth in the treaties and on modern surveys. (Plaintiff's Exhibit No. 5, transmitted with record to this Court.) That map, both as to the exterior boundaries of the Shoshone Nation and as to the interior boundaries of the five Divisions, including the complete boundary of Northwestern Shoshone land determined by reading together the territorial descriptions contained in the five treaties, conforms very closely to the map prepared by Governor Doty (R. 30).

This map shows 6,067,000 acres of Northwestern Shoshone land to be located in southern Idaho, sovereignty over which was conceded to the United States by the Oregon treaty of June 15, 1846 with Great Britain (9 Stat. 869). It also shows 6,389,000 acres to be located in northern Utah and 3,187,000 in northwestern Nevada, sovereignty over which was conceded to the United States by the treaty of February 2, 1848, known as the treaty of Guadalupe Hidalgo, with Mexico (9 Stat. 922) under which we obtained the Mexican cession.

Before ratification by the Senate, that body added an amendment to each of the treaties (except the treaty with the Western Shoshones), which expressly provided that nothing therein contained should be construed to admit of any greater title or interest in the lands than existed in the tribe under Mexican law (R. 57). The petitioners ratified and accepted the Senate amendment. (R. 57).

Subsequent Recommendation and Authorization to Extinguish Title by Treaty. After the executed treaties had been received by the Commissioner of Indian Affairs, he recommended in his Annual Report for 1863 "that measures be taken for the negotiation of further treaties with the [Shosone] Indians, having for their object the extinguishment of their title to the soil * * *."[24] By Act of Congress approved February 23, 1865 (13 Stat. 432) Congress authorized the President to enter into treaties with the tribes of Indians in Utah Territory for the surrender to the United States of their possessory right to all agricultural and mineral lands in said territory and for their segregation on reservations (R. 58-59). A treaty was subsequently (July 3, 1868) negotiated with the Eastern Shoshones by which they gave up the territory claimed by them in the Ft. Bridger Treaty in exchange for other lands. 15 Stat. 673 (R. 59). For the taking of these substituted lands, they recovered in *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476; 304 U. S. 111. No further treaty or agreement was ever negotiated or attempted to be made with petitioner bands (R. 59).

Benefits of Treaty Accepted by Respondent. From the outset, the rights granted by the Shoshonees in their land were recognized to be of great importance and value to respondent. As early as November 10, 1863, before the treaties had been ratified, Governor Doty wrote the Commissioner of Indian Affairs, as follows (R. 54):

> "The importance of these treaties to the government and to its citizens can only be appreciated by those who know the value of the continental tele-

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[24] *Ann. Rep. Commr. Ind. Affairs* (1863), pp. 37-8, Appendix pp. 18-19.

> graph and overland stage to the commercial and mercantile world, and the safety and security which peace alone can give to emigrant trains, and to the travel to the gold discoveries in the north, which exceed in richness—at least in the quality of the gold—any discoveries on this continent."

The use by respondent of the easements granted of the routes of travel, of agricultural settlements and military posts, of telegraph and overland stage lines, of a continental railway in and through Shoshone country—have in large part enabled the United States and its citizens to peacefully colonize six of the forty-eight states of our country (Utah, Idaho, Nevada, California, Oregon, and Washington) with all of their vast resources.

Subsequent taking of land recognized in Shoshone Treaties as belonging to petitioners. It is uncontradicted that practically all of the land claimed by petitioners (as set forth in petitioners' and related treaties) and for which compensation is sought, has been taken and is now possessed by the United States, or by its vendees. Thus, a few years after ratification of the Box Elder Treaty (before the year 1870), the United States opened land offices in Utah, Idaho and Nevada and extended the homestead and other public land laws to the area claimed and occupied by the plaintiff Indians, and began disposing of the lands.[25] Grants of large areas were made to railroads and to the states for school and other public purposes; forest reserves were created and lands were patented to homesteaders and other settlers; and a part of the land was set aside as the Fort

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[25] *Ann. Reps. Commr. G. L. O.* 1868, pp. 55-68, and 1869, pp. 163-174, 177-184.

Hall Indian Reservation for other bands of Indians[26] (R. 98-100). Under the procedure adopted by the Court of Claims with respect to Indian cases [Rule 39 (a)], that court first rules upon the right of plaintiffs to recover; and it is only upon and after a holding that they are entitled to recover that proof of damages is undertaken. Accordingly the entire evidence as to the extent to which the United States has taken the lands described in the treaties for its own use, including the sale thereof to its own citizens is not yet in the record, for as will be later set out in detail, the court below on the first hearing held plaintiff was not entitled to recover for any of this land.

Jurisdictional Act and Proceedings Below: From the time the United States exercised sovereignty over Shoshone country petitioner Indians have been under its tutelage and dependent upon it for protection. No attempt seems ever to have been made to afford any measure of redress until December 9, 1927 when Senator King of Utah introduced S. 710 (70th Cong.) which conferred jurisdiction on the Court of Claims:

> "to hear, adjudicate, and render judgment in any and all claims which the northwestern bands of Shoshone Indians may have against the United

[26]Act of July 1, 1862, 12 Stat. 489; Act of July 2, 1864, 13 Stat. 356; and Act of July 27, 1866, 14 Stat. 292 (railroads). Enabling acts granted certain sections to Utah, Nevada and Idaho for schools and other public purposes. See Act of July 3, 1890, 26 Stat. 215 (Idaho); Act of July 16, 1894, 28 Stat. 107 (Utah); and Act of March 21, 1864, 13 Stat. 30 (Nevada). In connection with establishments of forest reserves see Replies of Ass't. Secretary of Interior dated April 29, 1936, R. 96-97. For establishment of Fort Hall Indian Reservation see Executive order of June 14, 1867, 1 Kappler 838.

States arising under or growing out of the treaty of July 2, 1863 (Eighteenth Statutes, pages 685—2 Kappler, 848); treaty of July 30, 1863 (Thirteenth Statutes, page 663—2 Kappler, 850); Act of Congress approved December 15, 1874 (Eighteenth Statutes, page 291), and any subsequent treaty Act of Congress, or Executive order, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."

The bill thus introduced, was referred in the usual course to the Secretary of Interior for a report as to the claims of petitioner Indians. The Secretary, in reporting the purpose of the bill, stated (*S. Rep. No. 519, 70th Cong., 1st Sess.*):

> "The records show that the northwestern bands of Shoshone Indians were parties to the treaty of July 30, 1863 (13 Stat. 663), by which they affirmed the treaty of July 2, 1863 (18 Stat. 685), between the United States and the eastern band of Shoshone Indians.
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> "The northwestern bands of Shoshones are, *under the treaties mentioned,* asserting claims against the United States for large tracts of land in northern Utah and Nevada, and in southern Oregon and Idaho, and which lands, they allege, were disposed of by the Government without a cession by or consent of these Indians." (Italics added.)

Said bill, without any change in the above quoted language was enacted into law and became the jurisdictional act under which this suit was instituted (Act of Feb. 28, 1929, c. 377, 45 Stat. 1407; appendix p. 1). A

petition pursuant to the foregoing act was filed in the court below March 28, 1931 (R. 1). The court below rendered special findings of fact (R. 26) and an opinion (R. 63) upon which it was concluded that petitioners were not entitled to recover under the Treaty of July 30, 1863, or related treaties, for a taking of any portion of the land described in the treaties (R. 62). Petitioners were held entitled to recover for a deficiency of $10,800.17 for annuities promised by the treaty of July 30, 1863; but upon a further hearing with respect to the offsets of gratuitous expenditures made for Indian tribes which are required by the Act of August 12, 1935, c. 508, 49 Stat. 596; 25 U. S. C. Sec. 475a, it was held that the offsets precluded any recovery. The petition was thereupon dismissed (R. 77-79).

The court below purported to find as a fact that "the United States, in making and ratifying the treaty [of Box Elder] did not intend it should be a stipulation of recognition and acknowledgment of any exclusive use and occupancy right or title of the Indians" as against the United States in the whole or any part of the territory encompassed within the treaty of 1863 (R. 55-56, 58), particularly as "to any territory which was within the Mexican cession" (R. 58). The court acknowledged (R. 72; see also R. 66) that the record is sufficient to show that petitioners, so far as other tribes were concerned, exclusively occupied and used all or a portion of the territory involved in their present claim as their aboriginal home, but held that any claim for a taking of that aboriginal title did not arise under or grow out of the treaty within the terms of the jurisdictional act. The court further purported to find that "the United States has ever exercised dominion and complete ownership over the territory and land for which plain-

tiff bands now seek to recover compensation"; and that prior to and at the time of the treaty the United States had not recognized any right of exclusive occupancy in plaintiff tribe as against the United States to any territory in the Mexican Cession (R. 58). Petitioners contend that these findings are conclusions of law, plainly at variance with the conclusions which must be drawn from the facts found by the court. To the extent that there was any evidence with respect to these conclusions, they are completely unsupported in the record. That evidence has been brought before the Court and is wholly to the contrary.

The court below also held as to lands within the Mexican cession that in making the treaty with petitioner tribe the Executive Department and the Senate had in mind a desire not to recognize in the Indians "any possessory use or occupancy right, title or interest as against the United States to any specific lands for the reason that the United States in acquiring the territory from Mexico succeeded to all rights in the soil, possessory and otherwise, and the Government regarded itself as the absolute and unqualified owner thereof; that since the Indians had no possessory, occupancy, or other rights therein which were to be in any manner respected, the United States was under no obligation to treat with the Indians occupying the same for the extinguishment of their title" (R. 71). Although the court, in so holding, purports to follow *United States as Guardian, etc.* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, petitioners contend that the holding of the court below does violence to the *Santa Fe* case.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to hold that the word "claim", as used in Indian treaties, is a word of art constituting an acknowledgment or "recognition" by the United States of Indian title to the lands respectively described therein.

2. In holding that a treaty of "peace and amity" with an Indian tribe does not constitute an acknowledgment or recognition by the United States of the Indian title of the Indians to the lands they used and occupied.

3. In holding that the treaty of July 30, 1863, 13 Stat. 663, and related treaties, did not constitute an acknowledgment or "recognition" of petitioners' title to land.

4. In holding that as to land claimed by Pokatello and his Band, the Treaty of July 30, 1863, did not constitute an acknowledgment or recognition of petitioners' title.

5. In making and entering Finding No. 15.

6. In making and entering Finding No. 21.

7. In refusing to admit in evidence Plaintiff's Exhibit 4 filed March 4, 1941.

8. In holding that petitioners are not entitled, under the Treaty of July 30, 1863, and related treaties, to recover for the taking of their lands by respondent.

SUMMARY OF ARGUMENT

When migration through petitioners' country made necessary some arrangement with petitioners, the United

States was faced with the alternatives of outright extinguishment of petitioners' Indian title by conquest; or of purchase of such rights in their lands as were required (that is, by proceeding in recognition of rather than in opposition to petitioners' title); or of simply ignoring their Indian title and proceeding to dispose of their lands without any arrangement at all. The United States chose to proceed in recognition of petitioners' right to allow or withhold the desired privileges, and purchased the rights it wished, through formal treaty with petitioners. The court below, despite the treaty, disposed of the case as though petitioners were not under treaty with the United States. In doing so, it overlooked the normal principle of international law that a treaty necessarily implies some lawful national domain on the part of the respective parties.

In the treaty with petitioners, the United States acquired rights of way for travel through the Shoshone country; the right to establish "military agricultural" settlements; maintain ferries; erect houses; operate telegraph and overland stage lines and a transcontinental railway through the Shoshone country. Thereby the United States recognized that petitioners owned the country and could grant these licenses or easements; and the Indians could not have understood, from such a treaty, that the United States was not proceeding in recognition of the Indian right. As a matter of law, where one party obtains possession of real estate from another, he cannot be allowed to dispute the original title of him by whom he has been let into possession. The United States, as a party to a conveyance of land, is subject to this principle of estoppel. Decisions of the courts in other cases have held that where a right of way is obtained through Indian lands by treaty,

the United States recognized that the Indians owned the lands by right of occupancy, and that any subsequent taking of such land creates a cause of action arising under or growing out of the treaty. And where the Shoshone treaties of which petitioners' treaty is a part have heretofore been before the courts, they have been read as treaties creating "reservations". The fact that the United States might dispose of lands, thus recognized, to others without the consent of the Indians does not mean that in a suit by the Indians the United States is not bound to account for the rights thus taken.

An amendment to petitioners' treaty, incorporated by the United States Senate, demonstrates that the Senate understood the treaty recognized petitioner's title; for the Senate provided that the treaty should not be construed as admitting "any other or greater title or interest in the lands within the territories described in said treaty" than existed in the Indians upon the acquisition of the territories from Mexico by the laws thereof. The Senate indicated it understood the treaty recognized petitioners' title at least as to lands lying outside the Mexican cession, and even to lands inside the cession so far as petitioners had title under Mexican law. It cannot be supposed that the treaty did not recognize petitioners' title; for that would attribute to the Senate, in adopting the amendment and its subsequent ratification by petitioners, a wholly meaningless act.

The express provision in petitioners' treaty, Art. IV, that "The country claimed by Pokatello" lay within limits therein set forth constitutes an express recognition to so much land as is described; for the word "claim" is used in the sense of *title*, not merely the demand or pretension of a right. It is frequently so used as between whites; and in mining law, a "claim" is mining property owned by a

miner—not something to which he asserts an unrecognized right. In Indian matters the case is even clearer; and the word "claim" has been habitually used for generations as meaning "Indian title". This Court has so used the word; and it has been used in scores of treaties in a way clearly showing that lands "claimed" by the Indians are lands owned by them under the Indian title.

The court below ought to have construed petitioners' treaty in accordance with the traditional view that treaties should be construed to enlarge, not diminish, the rights which may be claimed under them. One party, in the courts of the other to which alone it can appeal, especially merits this consideration; for we are too self-respecting a nation to interpret with too strained or refined a reading the words of our own promises just because we have power enough to give us leave to read them as we please. Furthermore, this Court has ruled again and again that in construing treaties with an Indian tribe, all doubts must be resolved in favor of the Indians.

The lands embraced in petitioners' country are shown from the series of five treaties with the Shoshone Nation of which petitioners' treaty is a part, as corroborated by the map which was drawn by the treaty commissioner and which was before the Senate when the treaty was ratified. There is, therefore, no difficulty in determining the precise lands with which the treaty deals.

The interpretation of the treaties for which petitioners contend is supported by external aids to their construction. The matters leading up to the negotiation and execution of the treaties show that Congress had in mind that treaties would be negotiated only to secure rights of way, and not, as had been recommended, to extinguish to Indian title. After Congress authorized the treaty, the Com-

missioner of Indian Affairs instructed the commissioners appointed to negotiate the treaty that it should not be negotiated with a view to extinguishing the Indian title, but that they should secure an agreement to render secure for travel the routes through Shoshone country. The practical construction of the treaty following its execution also shows that the treaty was understood to have recognized petitioners' title; for administrative officials of respondent sought, and the Congress granted, authority to extinguish by treaty petitioners' title to their land. No treaty pursuant to this authority was ever negotiated with petitioners. Even after this suit was instituted, administrative officers having to do with Shoshone lands still read petitioners' treaty as having recognized petitioners' title to their country. The court below erred in excluding from evidence some of the documents showing these admissions of administrative officials.

The purported "findings of fact" of the court below that the United States did not negotiate or agree with respect to any acknowledgment or recognition of petitioners' title, and that the United States has ever exercised dominion and complete ownership over the lands for which petitioners claim compensation, are exclusively conclusions of law reviewable by this Court. Even if they were questions of fact, there is no evidence to support them. The fact that the United States has disposed of petitioners' lands does not go to show that petitioners never owned them. Even though the United States has power to dispose of Indian lands without the consent of the Indians, its disposition of their lands without their consent is a breach of treaty. Breach of agreement with the Indians does not prove that the Indians never had a contract recognizing

their right to the lands; and, after the granting of a jurisdictional act, petitioners are entitled to recover for the wrongful disposal of lands recognized as belonging to them.

ARGUMENT

When the rising tide of migration, and the necessity for overland railroad and telegraph lines through the lands of the Shoshone Indians made it necessary to come to some settlement with them of their rights, and the rights of respondent in their country, the United States was faced with certain alternatives:

In the first place, the United States could appeal to the sword and extinguish the Shoshone "Indian title"[27] by right of conquest. *United States as Guardian etc.* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 347; *Johnson* v. *McIntosh*, 8 Wheat. 543, 587. If the United States thus proceeded in opposition to the rights of the Shoshones, including petitioners, no court could question the power of the United

[27] From time immemorial prior to the negotiation of the treaty, petitioners had possessed an "Indian title", protected by the laws of the United States. This Indian title has been frequently defined by this Court as the right of the tribe to the use and occupancy of the soil to the exclusion of any other persons or the United States, but with a co-existing "ultimate fee" in the United States —that is, the ultimate exclusive right of the United States to assume ownership of the lands theretofore under the Indian title when that use and occupancy shall be terminated, together with the exclusive right to extinguish that Indian title. *Johnson* v. *McIntosh*, 8 Wheat. 543, 574, 588-596, 603; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17, 48; *Worcester* v. *Georgia*, 6 Pet. 515, 544-547, 552, 560; *Mitchel* v. *United States*, 9 Pet. 711, 745-746; *Holden* v. *Joy*, 7 Wall. 211, 243-4; *Leavenworth &c. R. Co.* v. *United States*, 92 U. S. 733, 742-743; *Beecher* v. *Wetherby*, 95 U. S. 517, 525-526; *United States as Guardian &c.* v. *Sante Fe. Pac. R. Co.*, 314 U. S. 339, 345, and cases cited.

States thus to acquire the territory of the Indians. "Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted." Marshall, C. J., in *Johnson* v. *McIntosh*, 8 Wheat. 543, 588.

Secondly, the United States might proceed peaceably by compact with the Indians to purchase from them such rights in their lands as were required by the United States and its citizens—that is, to proceed in recognition of, and not in opposition to, their right to allow or to withhold the privileges desired. The latter alternative would accord with the historical attitude[28] toward the aboriginal occupants of this

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[28]This Court has rather recently reviewed the policy of respecting the Indian title, in *United States as Guardian &c.* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 348. The consistent policy of the United States from the earliest days has been to protect the Indian tribes within our borders in the use and enjoyment of their lands. Commencing with the first Congress, when the statute for government of the Northwest Territory was adopted (Act of August 7, 1789, c. 8, 1 Stat. 50), it was provided—

> "Art. 3. . . . The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."

The Indian Trade and Intercourse Act of March 30, 1802, c. 13, 2 Stat. 139,141, §§ 4, 5, and that of June 30, 1834, c. 161, 4 Stat. 729, 730, §§ 8, 9, 10, 11, 12 and earlier temporary acts (the latter being reviewed and summarized in *Cohen, Handbook of Federal Indian Law* [1942], pp. 306-7), accorded protection to the Indian title. *United States as Guardian* v. *Santa Fe Pac. R. Co., supra.* Thus, too, in the various acts of Congress estab-

continent from the time of the earliest discoveries by Europeans until and following the founding of the United States —that the Indians "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion" (*Johnson* v. *McIntosh*, 8 Wheat. 543, 574);

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lishing the respective territories there was uniformly inserted the provision (later R. S. § 1839; 48 U. S. C. § 1451)—

> "Nothing in this title shall be construed to impair the rights of person or property pertaining to the Indians in any Territory, so long as such rights remain unextinguished by treaty between the United States and such Indians, or to include any Territory which, by treaty with any Indian tribe, is not, without the consent of such tribe, embraced within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of any Territory now or hereafter organized until such tribe signifies its assent to the President to be embraced within a particular Territory."

This policy extended to and embraced petitioners' lands; for "Indian country", as referred to in the Indian Trade and Intercourse Acts, was defined by the Act of 1834 as follows:

> "That all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana or the territory of Arkansas, and also that part of the United States east of the Mississippi river not within any State, to which the Indian title has not been extinguished, for the purposes of this act, be taken and be deemed to be the Indian country."

(This provision was repealed by reason of its omission from the Revised Statutes; but this Court has used it as the basis of determining the meaning of criminal statutes relating to the "Indian country". *Ex parte Crow Dog*, 109 U. S. 556, 561.)

It has been calculated that 389 treaties were entered into with the Indian tribes by the United States. *Home Missions Council of N. Am., Indian Wardship* [circa 1943], p. 37, see *Cohen, Handbook of Federal Indian Law* (1942), Annotated Table of Statutes and Treaties, p. 485.

that "The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them" (*Worcester* v. *Georgia*, 6 Pet. 515, 547). By its very nature, this alternative of admitting or acknowledging or recognizing petitioner's title, precluded any subsequent taking of petitioners' land, without rendering the United States, upon Congress authorizing suit, liable therefor (*United States* v. *Creek Nation*, 295 U. S. 103, 110; *United States* v. *Shoshone Tribe*, 299 U. S. 476, 304 U. S. 111; *United States* v. *Klamath & Moadoc Tribes*, 304 U. S. 119, 123). In petitioners' case this was the alternative actually chosen.

A final alternative—that of neither extinguishing by war (at least by formal war) nor of purchasing what was required by the United States and recognizing Indian title to the balance—was that of proceeding to occupy or dispense the lands without any binding[29] arrangement with the Indians at all. The court below, by holding that the treaty with petitioners did *not* amount to a "recognition or acknowledgment" of their title, assimilated the case to this last alternative. It relied upon certain of its own cases (*Duwamish, et al. Indians* v. *United States* (1934), 79 C. Cls., 530, 599-600, cert. den. 295 U. S. 755; cf. *Coos Bay Indian Tribes, et al.* v. *United States* (1938), 87 C. Cls. 143, 153; *The Wichita Indians* v. *United States*

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[29]Certain hard cases, not within the ambit of the present brief, exist in our Indian relations—namely, those where the Indians have been induced to give up their lands immediately upon the negotiation of treaties for cession of the lands, after which the treaties failed of ratification by the Senate. Compare the cases of the California Indians discussed in the opinion below, R. 71; *Coos Bay Indian Tribe* v. *United States* (1938), 87 C. Cls. 143, 153.

(1939), 89 C. Cls., 378, 420),[30] holding that in the absence of a treaty Indian tribes are not entitled to recover, and denied relief.[31]

Thus the court below confused "treaty" with "non-treaty" cases. In doing so, the court overlooked the normal and necessary principle of international law that the mere negotiation of a treaty, in the absence of an express disclaimer or contradictory provisions, constitutes a recognition of title or sovereignty of the respective parties to the territory possessed and occupied by each other. The law of nations has generally recognized that even a "treaty of peace and friendship" implies acknowledgment of the territorial integrity of the parties, and that the "status existing at the time the treaty of peace was signed is, unless a contrary intention is clearly expressed, contemplated by the parties".[32] A party would not be recognized as existing at

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[30]The cases relied upon have never been reviewed or approved by this Court. These cases are thrown in the gravest doubt by the later decision of this Court in *United States as Guardian &c.* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 347.

[31]The court below also cited *Hayt* v. *United States* (1903), 38 C. Cls. 455, 462. That case is not, like the others cited, a "non-treaty" case, since it involved Indians under a treaty rather similar to that of petitioners. However, the case did not involve the rights of the Indians as against the United States for any taking of their Indian title to their lands. And it was based upon a doctrine—that the policy of the United States was opposed to the recognition of the Indian title in lands acquired from Mexico—which now stands repudiated by this Court. *United States as Guardian &c.* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 345-346.

[32]*Crandall, Treaties, Their Making and Enforcement* (2d ed., 1916), Sec. 159, p. 352. Unlike the present treaties, the United States and others have in some cases made it an express condition of recognition "that the recognition should not prejudge the question of the eventual frontiers". See *Hackworth, Dig. Int. Law* (1940), vol. 1, § 103, p. 715. Thus, "The United States recognized the *de facto* government of the Armenian Republic on April 23, 1920, on the condition that the territorial frontiers should be left for later determination." *Ibid.*

all, let alone regarded as capable of contracting a treaty, if it had no lawful territory.[33]

Respondent has conceded that "an Indian treaty, like an international treaty, may import recognition 'of the territorial integrity of the parties,'" but insists that an Indian title is subordinate to its own title and that consequently a treaty with an Indian tribe does not imply an "acknowledgment that the Indian title is valid as against the United

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[33] *Hackworth, Dig. Int. L.* (1940), vol. 1, § 104, p. 725-726, cites the case of *German Continental Gas Co.* v. *Polish State*, IX Recueil des decisions tribunaux arbitraux mixtes (1929-30), 336, 346, translation. There it was urged Poland, though recognized, could not be considered as possessing Warsaw *de jure*, since it had belonged in law to Russia and had not been ceded to Poland. The German-Polish mixed arbitral tribunal, however, ruled:

> "But, whatever may be the importance of delimitation of frontiers, one cannot go so far as to contend that as long as this delimitation has not been juridically decided, the state in question cannot be considered as having any territory whatever. Here, also, the practice of international law and historical precedents indicate the contrary. In order that a state should exist and could be recognized as such with a territory without which it could not either exist or be recognized, it is sufficient that this territory should have a sufficiently certain consistency (even though its frontiers should not have been accurately delimited) and that, on this territory, the state should actually exercise national public authority in an independent manner. There are numerous examples of cases in which states have existed unquestionably, have been recognized and have been recognized mutually at a time when their frontier between them had not yet been accurately fixed. In this connection, it is unnecessary to recall the international arbitrations which have fixed the boundary between the Argentine Republic and Chile and the more recent one between Colombia and Venezuela, and one could not draw therefrom the conclusion that before these delimitations the states in question had no territory."

States."[34] There is no basis for such a distinction. From the beginning this Court has accorded to Indian treaties the same status as international treaties.[35] Moreover on neither principle or authority is there any reason why the United States in entering into a treaty with an Indian tribe does not recognize its "Indian title", in the same way as it would recognize the sovereignty of another nation and the right of that nation to make disposition of property within its jurisdiction without interference by the United States. *United States* v. *Belmont*, 301 U. S. 324. The fact that the United States holds the ultimate fee operates in no way to preclude recognition by the United States of the full interest the tribe possesses. A somewhat similar situation would exist were Finland to negotiate with Russia at some future date to obtain rights of way and building rights in those ports to which Russia was recently granted a 50-year lease under the treaty with Finland. No one would doubt that Finland in contracting for rights of way or easements would by so doing recognize Russia's 50-year leasehold interest, although such interest was subordinate to its own ultimate right of reverter.

Respondent's error is in assuming that there can be no implied treaty recognition of subordinate title. The contrary has always been recognized. As stated in Cohen in his recent authoritative "Handbook of Federal Indian Law":

> "The idea that land should be acquired from the Indians by treaty involved three assumptions: (1) That both parties to the treaty are sovereign powers; (2) *that the Indian tribe has a transferable title, of*

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[34]Brief of the United States in opposition, pp. 17-18.
[35]*The Cherokee Tobacco*, 11 Wall. 616, 621.

> *some sort, to the land in question;* and (3) that the acquisition of Indian lands could not safely be left to individual colonists but must be controlled as a governmental monopoly." (Italics added)

The doctrine that the negotiation of a treaty *ipso facto* constitutes recognition of Indian title has likewise been affirmed by this Court, *United States* v. *Brooks,* 10 How. 442, 459-60. In that case the Caddo Indians by treaty ceded certain lands to the United States, reserving four leagues of land for four white men who had been friends of the tribe. Subsequently the United States brought suit to set aside the conveyance to the four white men on the ground, among others, that the Caddo Indians had never owned such land. In the trial of the case the United States Attorney requested that the jury be instructed that Indians of a tribe *under treaty* with the United States did not hold land by the usual Indian title but were permitted merely to live upon it. The trial court refused the requested instruction and charged instead:

> "That the United States, by treating with the Caddo Indians for the purchase of their lands, recognized in said Indians a right to said lands, similar to the rights to lands generally recognized in Indian tribes with whom the United States have made treaties."

On appeal this was affirmed.

In the present case, there is no need to resort to the bare implication arising from the fact of negotiation of a treaty. The treaties on their face constituted a "recognition" or acknowledgment of petitioners' rights to their lands quite apart from that normal implication—as we now demonstrate:

I.

THE TREATY ON ITS FACE CONSTITUTES A RECOGNITION OF PETITIONERS' TITLE.

The grant and acceptance of rights of way and other easements in petitioners' land constitute an express recognition of petitioners' title thereto.

It should be noted that all five of the Shoshone treaties were negotiated under the same instructions and to accomplish the same purpose. Slight variations in language are thus immaterial. As the court below assumed, all the treaties must be construed together. By the Northwestern Shoshone treaty, which incorporated provisions of the Eastern Shoshone treaty, the petitioner Indians agreed—

1. That "routes of travel through the *Shoshone country* [described by the various treaties], . . . shall be and remain forever free and safe"; and petitioners guarantee "the safety of all travelers passing peaceably over said routes;"[36]

2. That "military agricultural settlements and military posts *may* be established by the President of the United States along said routes; . . .;"[36]

3. That "ferries *may* be maintained over the rivers wherever they may be required. . .;"[36]

4. That "houses [may be] erected and settlements formed at such points as may be necessary for the comfort and convenience of travellers;"[36]

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[36]Art. II of the Treaty of Ft. Bridger with the Shoshone Nation of Indians represented by the Eastern Bands (R. 40), incorporated and adopted in the Treaty of Box Elder with the Northwestern Bands of Shoshone Indians (R. 43, Art. II).

5. That "telegraph and overland stage lines . . . established and operated *through a part of the Shoshonee country*" would be protected by petitioners;[37]

6. That a railway to the Pacific Ocean "or its branches, *may* be located, constructed, and operated, without molestation from" petitioners *"through any portion of the country claimed by them."*[37]

It cannot be supposed that Indians to whom such provisions were interpreted possibly could have understood that the United States thereby "did not negotiate or agree" (as held by the court below, R. 30) as to their ancient rights in their country. As a matter of law, the granting of these rights by the plaintiff Indians and their acceptance by the United States are consistent only with the view that the United States thereby recognized, acknowledged and confirmed the title or possessory right of use and occupancy by which petitioner Indians held their lands. As stated by the court below in *Fort Berthold Indians* v. *United States* (1930), 71 C. Cls. 308, 332:

> "* * * Surely it was not essential to procure by treaty the grant of a perpetual right of way through Indian lands if the Indians did not own the same by right of occupancy. * * *"

And as stated by this Court in *Worcester* v. *Georgia*, 6 Pet. 515, 556:

> "By the fifth article [of the Treaty of Hopewell], the Cherokees allow the United States a road through their country, and the navigation of the Tennessee River. *The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withhold them.*" (Italics added.)

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[37]Art. III of the Treaty of Ft. Bridger (R. 40-41), incorporated and adopted in the Treaty of Box Elder with petitioners, Art. II (R. 43).

Just so here. To the extent the Northwestern Shoshone Treaty granted rights of way, etc., and permitted travel over the established routes, it brought about a limitation of the free use and occupancy of the lands which the plaintiff Indians had inhabited for many years. It is idle to contend that the United States did not approach the Indians as owners, asking them to concede these privileges, or that the United States did not, through the purchase of such privileges, acknowledge the rightfulness of the Indian claim. Plainly, the treaty was not intended, as the opinion of the court below would render it, to be almost entirely one sided. Petitioners were bound, on their part, to permit the United States to establish routes of travel, establish military posts, maintain ferries, erect houses for the convenience of travelers, and construct a railway in Shoshone territory. In its turn, then, respondent became bound on its part not to go beyond the privileges which, for a small consideration, it had been granted. As stated by *Crandall, Treaties, Their Making and Enforcement* (1916), p. 400, § 171, "The specific enumeration of certain rights with respect to a particular subject matter is a negation of all other analogous rights with respect to the same subject matter. The presumption is that the parties having expressed some, have expressed all, or as stated in the Latin phrase, expressio unius est exclusio alterius."[38] Nor is it

[38]Crandall cites for this, among others, Justice Brewer's opinion in *Tucker* v. *Alexandroff*, 183 U. S. 424, 436, in which Mr. Justice Brewer states, pp. 436-7: " . . . Upon general principles applicable to the construction of written instruments, the enumeration of certain powers with respect to a particular subject matter is a negation of all other analogous powers with respect to the same subject matter. [Citing cases.] . . . The rule is curtly stated in the familiar legal maxim, expressio unius est exclusio alterius."

possible for defendant to accept the benefits of the easements and at the same time deny petitioners' title. As stated in *Herman, Estoppel and Res Judicata* (1886), vol. 2, § 845, p. 974 (quoted with approval and followed by this court in *Chavez* v. *Bergere*, 231 U. S. 482, 491)[39]—

> "If a privity in estate has subsisted between the parties, proof of title is unnecessary; for a party is not allowed to dispute the original title of him by whom he has been let into possesion."

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[39]*Herman, op. cit.*, also states: "The acceptance of a grant is a conclusive admission of the right of the grantor to convey . . .", giving many illustrations (§ 726, p. 853); "A grantor is estopped to deny the title of a grantee, a mortgagor that of his mortgagee, and a vendee who goes into possession cannot dispute the title of his vendor while he remains in possession" (§ 675, pp. 809-810). The author cites, among other cases, *Willison* v. *Watkins*, 3 Pet. 43, 47-48, where this Court said, "It is an undoubted principle of law, fully recognized by this Court, that a tenant cannot dispute the title of his landlord. . . . The same principle applies to mortgagor and mortgagee, trustee and *cestui que trust*, and generally to all cases where one man obtains possession of real estate belonging to another, by a recognition of his title." Herman also refers to a case *Doe dem. Johnson* v. *Baytup* [1835], 3 Ad. & El. [K. B.] 188, 111 Eng. Reprint 384) as to which he states (*op. cit.*, vol. 2, § 844, p. 973) "the defendant asked leave of the party to get vegetables in the garden; having thus obtained an entrance took possession of the house and claimed title; *held*, that she was estopped. The party must first give up possession to the party by whom he was let in, and then, if he or she or anyone claiming by him has a title *aliunde*, that title can be tried by ejectment. This rule applies also to the case of a person coming in by permission, as a lodger or servant, . . ." In the case thus referred to, Lord Denman, C.J., ruled, "She held possession through a license, whether for a longer or shorter time is immaterial. She cannot claim against the party by whom she was let in; that party, as between them, has title." Coleridge, J., ruled to the same effect, holding that "The licensee, by asking permission, admits there is a title in the landlord."

Since in the present case, respondent, through privity of treaty, has acquired and accepted limited servitudes in petitioners' land—rights of way, right to quarter troops, maintain ferries, etc.—respondent is estopped to deny that it thereby recognized petitioners' dominant tenement.

Respondent here is in the position of the camel,[40] who having asked and received permission to put his nose under the tent to keep warm, actually moved the tent's owner out and took it over completely. The court below overlooks that the United States is subject to the doctrine of estoppel arising out of conveyances of land, just as is an individual. See *Menard's Heirs* v. *Massey*, 8 How. 293, 313-314.

Other Judicial Decisions Sustain Position of Petitioners

The decision of the court below in holding that defendant did not by the Box Elder treaty recognize the title of petitioners, is anomolous not only because of its legal reasoning, but more so because, without even trying to distinguish or differentiate, it fails to follow other decisions of the same court which squarely support petitioners' position.

The principal case is *Fort Berthold Indians* v. *United States*, (1930), 71 C. Cls. 308. There, the Arickarees, Gros Ventres, and Mandans Tribes of Indians sued the United States under a jurisdictional act which permitted the Court to determine the amount "due said tribes from the United States under *any treaties*, agreements, or laws of Congress," etc., for the value of lands taken from said tribes in violation of the treaty of September 17, 1851, 5 *Kappler* 1065, signed at Fort Laramie, Wyoming. By the terms of that treaty certain tribes of Indians agreed,

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[40] *Scudder, The Children's Book* (1910), p. 18.

as in the case at bar, that the United States and its citizens should have the right to establish roads, military and other posts within their country, and secured to the United States and its citizens the right to free passage through the same. Article 5 stipulated that the Indian nations, parties to the treaty, thereby recognized and acknowledged that certain described areas were their respective territories. Although the treaty contained no statement of tribal claim to such land as against the United States, nor any statement of express recognition of this tribal ownership by the United States, the court held that the effect of the treaty was to recognize title and treat the lands described therein as reservations for the Indians, and that the United States was liable for any subsequent taking of the land involved. In so deciding, the court states:

> "* * * The defendant says the territorial provisions were simply mutual recognition by the Indians of their claims to territory and its segregation by them [as between the tribes signing the treaty], without positive governmental recognition or verification of the same. This contention, as we view it, concedes that *when* the commissioners approached the Indians their title by right of occupancy to all the territory embraced within the treaty *was recognized* by the commissioners representing the Government, and that what the treaty did was to segregate the same into individual tribal allotments. In other words, the Government not only recognized the Indian title, *never at any time disputing it*, but by solemn treaty following negotiations, expressly agreed that each tribe was to be assured title to the territory set aside for it. *Surely it was not essential to procure by treaty the grant of a perpetual right of way through Indian lands if the*

Indians did not own the same by right of occupancy. It is true the lands set aside to each tribe embraced a vast domain. To the plaintiff Indians the treaty segregated territory of about 21,000 square miles and embracing close to 13,000,000 acres of land. With this vast estate, however, the treaty deals, and whether the Government in ratifying the treaty was moved by the then nominal value of somewhat of a wilderness, or concerned in Indian peace at present costs, the fact is that the treaty was ratified in the manner provided by law * * * (p. 332).

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"The law, for which we need not cite familiar precedents, is that in controversies between the Indians and the Government arising out of doubtful and ambiguous provisions of treaties or contracts they are to be taken most strongly against the Government. The Indians' rights are not to be prejudiced by technical construction or words of doubtful import * * *" (p. 333). (Italics added).

In *Assiniboine Indian Tribe* v. *United States* (1933), 77 C. Cls., 347, 370-371, appeal dismissed and cert. denied, 292 U. S. 606, the plaintiff tribe brought suit under a similar jurisdictional act (permitting determination of claims arising under or growing out of the same Fort Laramie treaty) for lands described in the treaty and which were subsequently taken by the United States. The court again held for plaintiff, although the amount of offsets precluded any net recovery. See also *Crow Nation* v. *United States* (1935), 81 C. Cls. 238, a suit under a similar jurisdictional act for the value of lands claimed under the Treaty of Fort Laramie, where the court below expressly recognized that that treaty "set aside a reservation of some 38 million acres to the Crow Nation" (p. 271).

The Shoshone Treaties of July 2 and July 30, 1863, the ones here sued upon, and the Fort Laramie Treaty of 1851, involved in the *Fort Berthold*, *Assiniboine*, and *Crow* cases, *supra*, were negotiated for precisely the same reasons and to attain the same ends. Abnormal increases in travel and constant trespass over Indian land, had provoked the Indians into the commission of depredations, and in each instance the United States sought by negotiating treaties to pacify them, identify their respective territories, secure the right of free and safe passage through their country, and to compensate them for such easements and for the extinction of game. Moreover, the treaties, in substance, carry the same reciprocal obligations and recognitions. Nevertheless, the Court of Claims under substantially identical jurisdictional acts, allowed recovery for taking the lands in the three cited cases, but denied recovery in the case at bar. There is no sound distinction between these cases.

Indeed this Court—as well as the court below—on the two occasions it had occasion to look at the Eastern Shoshone treaty (Treaty of Ft. Bridger, July 2, 1863, 18 Stat. 685, R. 40) read it as one creating a reservation for that division of the Shoshone Nation. *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, 485, reversing 82 C. Cls. 23, 26; same case, 304 U. S. 111, 113, affirming 85 C. Cls. 331, 335.[41] While the question was not, in that case,

[41] In that case the Eastern Shoshones sued, not under the Eastern Shoshone Treaty of July 2, 1863 (R. 40), but under a subsequent treaty signed July 3, 1868, 15 Stat. 673. Under the latter treaty they had relinquished the lands described in the earlier Eastern Shoshone treaty in exchange for other lands. The suit was to recover from the United States for having put another Tribe of Indians on part of the substituted lands for which recovery

before this Court as now presented, it is significant that as opposed to the narrow reading of the treaty indulged below, this Court read the treaty as one which acknowledged the territorial rights of the Indians.

The Indian title recognized by the Fort Laramie treaty was again upheld in *United States* v. *Northern Pac. R. Co.*, 311 U. S. 317. There the United States had by act of Congress conveyed to the railway company all lands as to which the United States "have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed," and had also agreed to "extinguish, as rapidly as may be consistent with public policy and the welfare of said Indians, the Indian title to all land falling under the operation of this act." This Court held that the United States, as between itself and the railway company,

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was allowed. Both the Court of Claims and this Court, however, examined the effect of the original Eastern Shoshone Treaty. The Court of Claims in each of its two decisions made the following special findings of fact:

"1. On July 2, 1863, plaintiff tribe of Indians and the United States entered into a treaty, 18 Stat. 685, which set apart for plaintiff a reservation * * *." "2. By the Treaty of July 3, 1868, 15 Stat. 673, plaintiff gave up and relinquished this reservation to the United States and accepted in lieu thereof the present reservation * * *". The first opinion of this Court which, for reasons here unimportant, remanded the cause to the Court of Claims, stated: "By treaty of July 3, 1868 (15 Stat. 673), the Shoshone Tribe of Indians relinquished to the United States a reservation * * * and accepted in exchange a reservation * * * with other benefits not now important." To the same effect was the language of this Court when it handed down its second opinion affirming the judgment of the Court of Claims: "The findings show: The United States, by the treaty of July 2, 1863, set apart for the Shoshone Tribe a reservation * * *. By the treaty of July 3, 1868, the tribe ceded that reservation to the United States."

could not deny it was intended that the railway company obtain the Indian lands; that as between the railway company and the United States the lands were not "reserved" by the United States within the meaning of the limitation on the granting clause. In so holding, the Court stated, it is true, that the Treaty of Fort Laramie "did not create technical reservations" in that it did not contain the "usual provisions for an Indian Agent for schools, assistance in farming operations, etc." But the Court, on the other hand, did not depart from the established doctrine upon which petitioners rely, namely, that while the railway company secured the land under the terms of the grant, the Indians who had been recognized by the Fort Laramie Treaty still had title thereto, which had to be extinguished by the United States under its statutory duty to the railway company. For in the concluding paragraph of the opinion on this question the Court says that "This Court has repeatedly passed upon the question; has held the lands were Indian country, subject only to the Indians right of occupancy; . . . and that . . . the United States assumed the obligation of extinguishing the Indian title in favor of the Company." The *Northern Pacific* case did not involve a controversy between any Indian tribe and the United States, but merely turned upon whether by the terms of the grant to the railway company the United States intended to transfer lands in which the Indians had a recognized possessory right of use and occupancy.

In the determination of a contest between the United States and an Indian tribe for the taking of the Indian title, it is, of course, unimportant whether the treaty under which the Indians claim established "technical reservations" with Indian agents in charge, etc., as referred to by this Court

in the *Northern Pacific* case, or recognized the existing Indian title. For as stated by this Court in an analogous situation (*Minnesota* v. *Hitchcock*, 185 U. S. 373, 388-9):

> "Whether this tract, which was known as the Red Lake Indian reservation, was properly called a reservation, as the defendant contends, or unceded Indian country, as the plaintiff insists, is a matter of little moment. Confessedly the fee of the land was in the United States, subject to a right of occupancy by the Indians. That fee the government might convey, and whenever the Indian right of occupancy was terminated (if such termination was absolute and unconditional) the grantee of the fee would acquire a perfect and unburdened title and right of possession. At the same time, the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon."

The fact that in the *Northern Pacific* case both the railway and the Indians were entitled to the lands under their respective agreements with the United States would not mean that if the railway recovered the lands, the Indians would not be entitled to recover for their loss, as in the *Fort Berthold* case, above. Cf. *Menominee Tribe of Indians* v. *United States* (1941), 95 C. Cls. 232, where the United States, having agreed to convey to the Menominee Indians certain lands which it had already conveyed to Wisconsin, was held liable at the suit of the Indians for the value of such land. In so holding, the Court of Claims distinguished *United States* v. *Minnesota*, 270 U. S. 181, which, like the *Northern Pacific* case, involved not a contest between the United States and an Indian tribe whose

title had been recognized, but a contest between the United States and one of its grantees. Although in the *Menominee* case the respondent had an absolute right of appeal, it acquiesced in the decision and subsequently stipulated as to the amount of damages.

The Senate Amendment is Conclusive on Question of Recognition.

The Senate, in ratifying the treaty made plain that it understood the treaty operated to recognize petitioner's title. With all of the Shoshone treaties and the Doty map before it, the Senate added an amendment to each of the treaties (except the treaty with the Western Shoshones, which was not ratified until much later than the other four, R. 72) providing:

> "Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof" (R. 57).

The Court below held that the primary purpose and scope of the treaty was that of peace and amity (R. 56); that without the Senate amendment the treaty did not admit or deny Indian title, and that the amendment added nothing to the treaty in this respect (R. 74). This holding does violence to the interpretation Congress ascribed to the treaties. If, as insisted by the court below, they were merely treaties of peace and amity, and no more, there would have been no need whatever for the Senate amendment. By inserting such a provision restricting and qualifying the effect of the treaty as far as recognition of title to the lands

derived from Mexico was concerned, the Senate clearly indicated it understood the treaty accorded recognition of petitioners' title at least to the lands which lay outside of the Mexican cession. There was no need for any exception if the treaty recognized no rights; and the imposition of such a limitation as was adopted, under the rule *expressio unius est exclusio alterius,* demonstrates that the Senate was imposing no limitation on land other than that within the Mexican cession. *Walla Walla* v. *Walla Walla Water Company,* 172 U. S. 1, 22; *Arthur* v. *Cumming,* 91 U. S. 362; *Sturges* v. *The Collector,* 12 Wall. 19, 27.[42]

And even as respects the Mexican lands, the amendment itself is an express recognition of such title as existed in petitioners under Mexican law. To hold that the Senate amendment added nothing is to attribute to the Senate a wholly futile, useless and meaningless act, which will not be presumed. *Mid-Northern Oil Co.* v. *Walker,* 268 U. S. 45, 48; *Geofroy* v. *Riggs,* 133 U. S. 258, 269-270; *Market Co.* v. *Hoffman,* 101 U. S. 112, 115; *Wheaton* v. *Peters,* 8 Pet. 591, 661; *Galloway* v. *Finley,* 12 Pet. 264, 298.

Thus, in the *Mid-Northern Oil Co.,* case, Mr. Justice Sutherland stated:

> "It fairly cannot be supposed that Congress would indulge in the altogether idle ceremony of enacting a law [in this case an amendment] to save

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[42]In *Sturges* v. *The Collector,* the Supreme Court, in discussing a Revenue Act, stated:

> "Raw cotton and raw silk * * * were exempted from the new duty * * * by an exemption inserted in the body of the section and it is reasonable to assume that if Congress had intended to exempt any other article * * * the article would have been enumerated and included in that exception."

> rights which, being in no way challenged or affected, stood in no need of being saved."

The ruling of the court below that the amendment "added nothing to the treaty" reduces the amendment to *brutem fulmen*, and contravenes the long-established rule announced by Mr. Justice Field in *Geofroy* v. *Riggs, supra*:

> "It is a rule, in construing treaties as well as laws, to give a sensible meaning to all their provisions if that be practicable. 'The interpretation, therefore', says Vattel, 'which would render a treaty null and inefficient, cannot be admitted'; and again, 'it ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory.' Vattel Bk. 2, c. 17."

Subsequent to the time this case was submitted but before it was decided below, this Court, following its earlier pronouncements, expressly held that "it has been the policy of the Federal Government from the beginning to respect the Indians right of occupancy" (Indian title) and "that lands within the Mexican cession were not excepted from" this policy.[43] *United States as Guardian, etc.* v. *Santa Fe*

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[43]Although the court below admitted that under this Court's decision petitioner bands had Indian title to the lands in the Mexican cession, as well as elsewhere (R. 64), the court seemed confused in its thinking for elsewhere in its opinion (R. 71) it refers to the Senate's refusal in 1852 to ratify 18 treaties with the Indians of California, because it did not want to recognize "any possessory use or occupancy right, title or interest" of the Indians of California to land in California which also came from Mexico, and concludes that the "Executive Department and the Senate had that policy or attitude in mind in 1863 and 1864 when the treaty with plaintiff bands of the Shoshone Indians was negotiated, made, and ratified with the" amendment here considered. We do not understand how it is possible to hold that because

Pacific Railroad Co., supra, p. 345, see also R. 65. The question of law, which was reserved by the Senate in its amendment to the treaty, having been thus resolved, it is clear that the Indian title recognized by the treaty applied to all the lands encompassed by petitioners' treaty.

The phrase "Country Claimed" in petitioners' treaty was used as the equivalent of title.

The court below in arriving at its interpretation of petitioners' treaty, placed its main reliance on the fact that the draftsman of petitioners' treaty described petitioners' land merely as "The Country *claimed* for Pokatello for himself and his people", etc. The Court seized upon the phrase "country claimed" (R. 73-4) and attributed its use to a mere desire on the part of respondent "to obtain as much information as possible as to what territory the Indians *claimed*, because the Government had no information in that regard from the Indians themselves, and very indefinite information otherwise as to the territory which they occupied" (R. 74). (Italics are by the court.) The court thus placed upon the word "claimed" the connotation that it was merely the unrecognized assertion or pretention of a right.

No such reason would normally prompt setting out, in language of the kind chosen, the mere assertion of the Indians. A desire to obtain information as to country occupied could have been fulfilled by calling on Superintendent Doty and other government officials for reports.

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the Senate, in order not to recognize Indian title to land in California, refused to ratify the California treaties, it follows that the Shoshone treaties which were ratified, must be construed as carrying out the same policy of non-recognition. The reverse must be true.

Language in some of the Shoshone treaties is too plain to admit of the construction that the United States was merely ascertaining the demands and pretentions of the Shoshones; for the series of five treaties used the language that it was "*understood* the boundaries of the Shoshone country, as defined and described by said nation" were as therein delineated;[44] and that the land described was "*understood*" to be the "boundaries of the country *claimed and occupied*".[45] This is not the language of mere pretension of a right. And yet, the five treaties, in lieu of one treaty, having been negotiated under one set of instructions and to accomplish identical purposes, it is most unlikely that language would be chosen advertently to admit or acknowledge the Indian title of certain divisions of the Shoshone Nation and yet not do so as to the other divisions of the same nation. And as previously pointed out (pp. 40-41) the Eastern Shoshone treaty has already been read by both the court below and this Court to recognize the title of the Eastern Shoshone Division.

The language in the treaty of the Mixed Bands (R. 50-51, Art. IV) and in that of petitioners, which is "country claimed" must be interpreted the same as the above language in the other treaties. Viewed in its historical setting, the object of the use of the phrase, "country claimed" was agreement on the terirtorial rights of the Shoshones. The commissioners were instructed to secure from petitioners in their treaty "a definite acknowledgment * * * of the boundaries of the entire country they claim, as of the limits within which they will confine themselves * * *."

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[44]Eastern Shoshone Treaty, Art. IV, R. 41.

[45]Western Shoshone Treaty, Art. V, R. 46; Shoshonee-Goship Treaty, Art. V, R. 48-49.

In the days of the frontier the word "claim" as between whites who could read and write and entirely apart from Indian title was often used as the equivalent of *title* or *right*. In *Southern Pac. R. Co.* v. *United States* (N. D. Cal., 1889), 38 Fed. 55, 56, Judge Sawyer stated, "The word, 'claim', is very broad and comprehensive in its signification—quite as comprehensive as any of its synonyms —demand, pretension, right, privilege, title." The Supreme Court of California interpreted the phrase "claim to" possession of land in a revenue act, which spoke apparently disjunctively of "ownership of or claim to or possession of," land, as involving more than the mere assertion of a right in the land. *People* v. *Frisbie* (1866), 31 Cal. 146, 148. The Supreme Court of South Dakota held that the word "claim" when used in relation to real property was generally used in the broader sense of "title" or "ownership". *Sherman* v. *Sherman* (1909), 23 S. D. 486, 494-5, 122 N. W. 439, 443. When the public domain of the west was being opened, an entry was known as a "claim"; and when perfected, though officially designated a "patent", colloquially it was not so restricted. In mining law, the word "claim" was generally used as meaning "title". As stated in *Northern Pac. R. Co.* v. *Sanders* (C. C. A. 9th, 1892), 49 Fed. 129, 135:

> "Just here seems to be a good place to remark that, in the common parlance of the mining districts, the word 'claim', used as a noun, has a definite and particular meaning, denoting, when coupled with the name of miner, a particular piece of ground to which that miner had a recognized vested and exclusive right of possession for the purpose of extracting precious metals therefrom, . . ."

This Court has recognized that it was used synonymously with the word "location" to denote rights in mineral land. *Del Monte Min. & Mil. Co.*, v. *Last Chance Min. & Mil. Co.*, 171 U. S. 55, 74, and *passim*, quoting many acts of Congress.

In Indian land matters, the word "claim" has taken on an equal or even broader connotation. It has there become a word of art. In its various inflections and tenses it has come to mean none other than Indian title. This Court has so regarded it in a number of cases.[46]

The treaty making branch of respondent has consistently used the word "claim" as synonymous with "title". In scores of treaties made with Indian tribes it has been used to denominate the peculiar property of Indian tribes in their land as the phrase "miner's claim" has been used to denote the property interest of a miner, or as the word "fee" has been used to denominate property of the whites. Thus, where the United States has ceded its own lands to the Indians—in one instance conveying the lands "in fee

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[46]In *Nadeau* v. *Union Pac. R. Co.*, 253 U. S. 444, 446, this Court appositively defined the word "claim" as follows: " . . . the lands were but part of the domain held by the tribe under the ordinary Indian claim—the right of possession and occupancy—with fee in the United States." In *Clark* v. *Smith*, 13 Pet. 195, 200-201, the Court spoke of "the claim of the Chickashaw Indians" to their country, prior to its extinguishment, in a sense which indicated that it meant the Indian title; and the Court, in reviewing that case in *Buttz* v. *Northern Pac. R. Co.*, 119 U. S. 55, mentioned that the objection that a patent was void because issued for lands "within a country claimed by Indians" had been rejected notwithstanding the Indian title was respected, quoting the *Clark* case for the proposition that "This right of occupancy was protected by the political power and respected by the courts until extinguished, when the patentee took the unencumbered fee." See also p. 70, where the Court again uses "Indian claim" as synonymous with "Indian title."

simple"[47]—the title, when reconveyed to the United States by the Indians, was denominated merely as a "claim" to the lands.[48] That it means more than an "interest" in land, is evident from the contrasting use of these words in a cession by the Sac and Fox Indians to the United States, of "all lands * * * to which they have *any claim*, or title, or in which they have *any interest whatever*."[49] That it means more than a mere pretension or assertion of a claim is shown by a treaty where the Indians cede the lands they "claim" and in addition those to which they "pretend to have any claim."[50] That it means actual Indian ownership is shown by treaties in which the Indians ceded lands "occupied and claimed by them," retaining the right to reside on ground in the ceded area "not in the actual claim and occupation of citizens of the United States; and

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[47]Treaty with the Choctaws, September 27, 1830, 7 Stat. 333, 2 Kappler 310, Art. 2.

[48]Treaty with the Peorias, Sept. 25, 1818, 7 Stat. 181, 2 Kappler 165, Art. 5, ceding lands to the Peorias, with which compare Treaty with the Kaskaskia and Peoria, Oct. 27, 1832, 7 Stat. 403, 2 Kappler 376, Art. 3, in which the Peorias "cede and relinquish to the United States, *all their claims* to land heretofore reserved by, or assigned to them in former treaties * * *."

Treaty with the Choctaws, Sept. 27, 1830, 7 Stat. 333, 2 Kappler 310, Art. 2, conveying to the Choctaws "in fee simple" certain country west of the Mississippi, with which compare Treaty with the Choctaws and Chickasaws, June 22, 1855, 11 Stat. 611, 2 Kappler 706 (preamble, par. 2), wherein the Choctaws relinquished *"all claim"* to a part of the territory.

See also Treaty with the Creeks, Jan. 24, 1826, 7 Stat. 286, 2 Kappler 264, Art. 1, and treaty referred to therein.

[49]Treaty with Sac and Fox, October 11, 1842, 7 Stat. 596, 2 Kappler 546, Art. 1.

[50]Treaty with the Otoe and Missouri, Sept. 21, 1833, 7 Stat. 429, 2 Kappler 400, Art. 1, in which the language was a cession of lands south of a line "running in a due west line as far west, as said Otoes and Missourias, *have*, or *pretend to have any claim.*"

upon any ground claimed or occupied, if with the permission of the owner or claimant"[51]—the ownership of the whites thus being described in words the exact equivalent of those used to describe the title of the Indians.

The Indians frequently have ceded their lands in terms of "all their claim";[52] "all claim whatever";[53] "all claim";[54] and "claim of any kind whatsoever."[55] It has been expressed that the Indians were receiving payment for "country claimed by them";[56] or that particular boundaries encompassed land "claimed by them";[57] or that the cession was of "all their claim to land"[58] or of "all claim" to certain territory;[59] or that they were conveying "all the country claimed by them."[60]

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[51]Treaty with the Yakima, June 9, 1855, 12 Stat. 951, 2 Kappler 698, Arts. 1 and 2. Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957, 2 Kappler 702, Arts. 1 and 2.

[52]Treaty with the Miami, Oct. 23, 1826, 7 Stat. 300, 2 Kappler 278, Art. 1. Treaty with Kaskaskia and Peoria, Oct. 27, 1832, 7 Stat. 403, 2 Kappler, 376, Art. 3.

[53]Treaty with the Delawares, Sept. 24, 1829, 7 Stat. 327, 2 Kappler 304.

[54]Treaty with the Seminoles, May 9, 1832, 7 Stat. 368, 2 Kappler 344, Art. 1. Treaty with the Seneca, Nov. 5, 1857, 11 Stat. 735, 12 Stat. 991, 2 Kappler 767, Art. 1.

[55]Treaty with the Potawatomi, June 5 and 17, 1846. 9 Stat. 853, 2 Kappler 557.

[56]Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963, 2 Kappler 714, Art. 1.

[57]Treaty with the Molala, Dec. 21, 1855, 12 Stat. 981, 2 Kappler 740, Art. 1.

[58]Treaty with the Delawares, Oct. 3, 1818, 7 Stat. 188, 2 Kappler 170.

[59]Treaty with the Choctaws and Chickasaws, June 22, 1855, 11 Stat. 611, 2 Kappler 706, preamble.

[60]Treaty with the Klamath, Oct. 14, 1864, 16 Stat. 707, 2 Kappler 865, Art. 1. Treaty with the Tribes of Middle Oregon, *supra* note 56.

Thus, too, the cession has been of the lands "claimed and owned,"[61] "owned and claimed,"[62] or "owned or claimed."[63] Sometimes it has been expressed as a cession of lands and country "occupied and claimed,"[64] *or* "occupied or claimed."[65] Some treaties recognized, as to Indians not parties to the treaty, that they might have title to some of the lands ceded, by providing that if such bands "residing in and claiming" any portion of the country ceded should not become parties to the treaty, then the consideration should be proportionately adjusted in accordance with the whole number of Indians "residing in and claiming the entire country."[66] The lands are spoken of as being "owned, claimed *or* possessed,"[67] "owned, possessed, or claimed,"[68] or "claimed, held, or possessed."[69]

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[61]Treaty with the Wea, Oct. 2, 1818, 7 Stat. 186, 2 Kappler 169, Art. 1.

[62]Treaty with the Chippewa, Feb. 22, 1855, 10 Stat. 1165, 2 Kappler 685, Art. 1; Treaty with the Chippewa, Red Lake and Pembina Bands, Oct. 2, 1863, 13 Stat. 667, 2 Kappler 853, Art. 2.

[63]Treaty with the Pawnee, Sept. 24, 1857, 11 Stat. 729, 2 Kappler 764, Art. 1; Treaty with the Creeks, Aug. 7, 1856, 11 Stat. 699, 2 Kappler 756, Art. 5; Treaty with the Ponca, Mar. 12, 1858, 12 Stat. 997, 2 Kappler 772, Art. 1.

[64]Treaty with the Yakima, June 9, 1855, 12 Stat. 951, 2 Kappler 698, Art. 1.

[65]Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957, 2 Kappler 702, Art. 1; Treaty with the Flatheads, July 16, 1855, 12 Stat. 975, 2 Kappler 722, Art. 1.

[66]Treaty with the Wallawalla, June 9, 1855, 12 Stat. 945, 2 Kappler 694, Arts. 1 and 2; Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963, 2 Kappler 714, Art. 1.

[67]Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478, 2 Kappler 439, Art. 1.

[68]Treaty with the Yankton Sioux, Apr. 19, 1858, 11 Stat. 743, 2 Kappler 776, Art. 1; Treaty with the Arapaho and Cheyenne, Feb. 18, 1861, 12 Stat. 1163, 2 Kappler 807, Art. 1.

[69]Treaty with the Chippewa, Bois Fort Band, Apr. 7, 1866, 14 Stat. 765, 2 Kappler 916, Art. 2.

The words of grant themselves have not been limited to the traditional "right, title and interest" of the draftsman of deeds. Thus, the cession has been expressed to be of "all their title and claim,"[70] or "title or claim,"[71] of "all claim or title,"[72] or "all interest or claim,"[73] or "all their right, claim, and title,"[74] or "all their claim, interest and title,"[75] or "all their right, title and claim,"[76] or "all right,

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[70]Treaty with the Choctaw, Oct. 24, 1816, 7 Stat. 152, 2 Kappler 137, Art. 1.

[71]Treaty with the Creeks, Feb. 12, 1825, 7 Stat. 237, 2 Kappler 214, Art. 1; Treaty with the Kansas, June 3, 1825, 7 Stat. 244, 2 Kappler 222, Art. 1; Treaty with the Winnebago, Sept. 15, 1832, 7 Stat. 370, 2 Kappler 345, Art. 1; Treaty with the Sac and Fox, Sept. 21, 1832, 7 Stat. 374, 2 Kappler 349, Art. 1.

[72]Treaty with the Chickasaw, Oct. 19, 1818, 7 Stat. 192, 2 Kappler 174, Art. 2; Treaty with the Florida Tribes of Indians, Sept. 18, 1823, 7 Stat. 224, 2 Kappler 203, Art. 1; Treaty with the Quapaw, Nov. 15, 1824, 7 Stat. 232, 2 Kappler 210, Art. 1.

[73]Treaty with the Iowa, Oct. 19, 1838, 7 Stat. 568, 2 Kappler 518, Art. 1, § 1 (see § 2).

[74]Treaty with the Ottawa, Aug. 24, 1816, 7 Stat. 146, 2 Kappler 132, Art. 1.

[75]Treaty with the Shawnee, Nov. 7, 1825, 7 Stat. 284, 2 Kappler 262, Art. 1.

[76]Treaty with the Miami, Feb. 11, 1828, 7 Stat. 309, 2 Kappler 286, Art. 1; Treaty with the Winnebago, Aug. 1, 1829, 7 Stat. 323, 2 Kappler 300, Art. 1; Treaty with the Sioux, Aug. 5, 1851, 10 Stat. 954, 2 Kappler 591, Art. 2; Treaty with the Kalapuya, Jan. 22, 1855, 10 Stat. 1143, 2 Kappler 665, Art. 1; Treaty with the Wallawalla, June 9, 1855, 12 Stat. 945, 2 Kappler 694, Art. 1; Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963, 2 Kappler 714, Art. 1; Treaty with the Klamath, October 14, 1864, 16 Stat. 707, 2 Kappler 865, Art. 1; Treaty with the Chippewa, Apr. 7, 1866, 14 Stat. 765, 2 Kappler 916, Art. 2.

title, interest and claim,"[77] or "all of their claims, right, title, and interest,"[78] or "all their right, title, interest, claim, and privilege."[79]

Uniformly in Indian treaties, by use of the word "claim," the parties have understood that the Indians conveyed something more than the release of a mere assertion of some undefined interest; for in such cases, the treaties speak of the "land herein conveyed." And despite the fact that a "claim" to land was conveyed to the United States, the Indians nevertheless frequently made reservations in the treaty of conveyance, where they were retaining some part of their old lands (instead of removing to new ones).[80] In such a situation we know of only one case in which respondent has ever made the objection that the reservation retained was not in fact owned. In that case (*United States* v. *Brooks*, 10 How. 442) respondents' objection was overruled (See p. 32 *ante*). Indeed apart from the

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[77]Treaty with the Iowa, Aug. 4, 1824, 7 Stat. 231, 2 Kappler 208, Art. 1; Treaty with the Osage, June 2, 1825, 7 Stat. 240, 2 Kappler 217, Art. 1; Treaty with the Cherokee, Aug. 6, 1846, 9 Stat. 871, 2 Kappler 561, Art. 4; Treaty with the Umpqua, Sept. 19, 1853, 10 Stat. 1027, 2 Kappler 606, Art. 1; Treaty with the Molala, Dec. 21, 1855, 12 Stat. 981, 2 Kappler 740, Art 1; Treaty with the Rogue River Tribe, Sept. 10, 1853, 10 Stat. 1018, 2 Kappler 603, Art 1.

[78]Treaty with the Utah-Tabequache Band, Oct. 7, 1863, 13 Stat. 673, 2 Kappler 856, Art. 2, which as this Court said "must be viewed as giving the band a country—limited by reservation boundaries—never before possessed by this band." *Hayt* v. *United States* (1903), 38 C. Cls. 455, 464.

[79]Treaty with the Winnebago, Oct. 13, 1846, 9 Stat. 878, 2 Kappler 565, Art. 2.

[80]See *e.g.*, Treaty with the Miami, Oct. 23, 1826, 7 Stat. 300, 2 Kappler 278; Treaty with the Yakima, June 9, 1855, 12 Stat. 951, 2 Kappler 698, Art. 2; Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957, 2 Kappler 702, Art. 2.

Brooks case, *supra*, the present case, so far as counsel for petitioners have been able to determine, is the first case, in any situation, where it has been contended or held that the word "claim" in an Indian treaty does not connote the Indian right of use and occupancy.

Treaty Provisions Construed to Enlarge, Not Diminish Rights Claimed Under It.

Assuming arguendo that the Box Elder treaty could be construed either as a recognition or non-recognition of petitioners' title, the traditional view of this Court is that it should be so construed as to uphold and enlarge rather than destroy and diminish petitioners' property rights. The peculiar canon of construction applied to treaties was stated by Stone, J. in *Nielson* v. *Johnson*, 279 U. S. 47, 52 as follows:

> "When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, * * *."

To the same effect are the decisions in *Hauenstein* v. *Lynham*, 100 U. S. 483, 487; *Factor* v. *Laubenheimer*, 290 U. S. 276, 293-4; *Asakura* v. *City of Seattle*, 265 U. S. 332, 342.

American statesmen and jurists have generally taken the view that once we accept a treaty, we are too self-respecting a nation to construe it narrowly because we have the power to enforce our decisions. Thus, President Wilson in requesting the repeal of the law exempting coastwise American ships from Panama Canal tolls as contrary to a treaty with Great Britain said:

> ". . . We consented to the treaty; its language we accepted, if we did not originate; and we are too big, too powerful, too self-respecting a Nation to interpret with too strained or refined a reading the words of our own promises just because we have power enough to give us leave to read them as we please . . ." (51 *Cong. Rec.* 4346).

Senator Elihu Root in debate on the Hay-Pauncefote treaty on May 21, 1914, gave voice to the same theory:

> ". . . Whenever we seek to impose upon these words a narrower construction for our own interests than the makers of the treaty understood them to have, we should remember the fundamental rule of morals that a promisor is bound to keep a promise in the sense in which he had reason to believe the promisee understood it was made." (51 *Cong. Rec.* 8945).

As applied to the instant case, this rule of construction requires that the Box Elder treaty be construed so as to require recognition of petitioners' title.

The same interpretation results also from the fact the petitioners were Indian who could neither read nor write as well as the fact that the treaty was drafted by respondent's agents. In such a situation all doubt must be resolved against respondent.[81]

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[81] As stated by Crandall: "If the ambiguous words are those of one party only, as might be the case in an agreement recorded by an exchange of notes or counter-declarations, or in the counterpart of its own language, they are to be construed against rather than in favor of the party using them. It was a maxim of early Roman law that an agreement obscurely expressed or of doubtful meaning was to be interpreted against the person who had it in his power to set down the terms more clearly. So far as a treaty comes before a domestic court of one of the contracting parties

Treaties with Indian Tribes Should Never Be Construed to Their Prejudice.

It is undoubtedly because of these considerations that the invariable rule of this Court has been that in construing treaties with an Indian tribe, all doubts must be resolved in their favor. *Worcester* v. *Georgia*, 6 Pet. 515, 551, 552, 582. To the same effect, *Kansas Indians*, 5 Wall. 737, 750; *Jones* v. *Meehan*, 175 U. S. 1, 10-12; *United States* v. *Winans*, 198 U. S. 371, 380-381; *Seufert Bros. Co.* v. *United States*, 249 U. S. 194, 198; *Marlin* v. *Lewallen*, 276 U. S. 58, 64; *Northern Pacific Ry. Co.* v. *United States*, 227 U. S. 355, 366-367; *United States* v. *Payne*, 264 U. S. 446, 448-449; *United States* v. *Shoshone Tribe of Indians*, 304 U. S. 111, 116. The rule is stated in *Jones* v. *Meehan, supra*, as follows:

> "In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms

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as a municipal law, it should be construed with the utmost good faith and with a view to carry out the apparent intention of the parties. It is primarily a compact between the two nations." *Op. cit.*, note 32 *ante*, § 171, pp. 400-401; and see the quotation from *Jones* v. *Meehan*, 175 U. S. 1, 10-12, on next page of this brief.

of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. *Worcester* v. *Georgia*, 6 Pet. 515; *The Kansas Indians*, 5 Wall. 737, 760; *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, 28. In the case of *Worcester* v. *Georgia*, (1832) Chief Justice Marshall, speaking of article 4 of treaty of Hopewell of November 28, 1785, between the United States and the Cherokee Indians, which defined 'the boundary allotted to the Cherokees for their hunting grounds, between the said Indians and the citizens of the United States,' (7 Stat. 19,) said: 'There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact that every one makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them.' 'Is it reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word "allotted" from the words "marked out".' 6 Pet. 551, 552. And Mr. Justice McLean, concurring said: 'The language used in treaties with the Indians should never be construed to their prejudice.' 'To contend that the word "allotted", in reference to the lands guaranteed to the Indians in certain treaties indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.' 6 Pet. 582."

This rule was recently reiterated in *United States* v. *Shoshone Tribe of Indians, supra,* in which Mr. Justice Cardozo writing for the Court ruled that treaties with Indian tribes are to be read not "narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them."

The territory recognized was the land set forth in petitioners' treaty as supplemented by the territorial descriptions of the other treaties.

The court below, because it held there was no recognition, was not required in its findings to set forth boundaries of the land which the treaty recognized. In its opinion, however, it stated that petitioners were not entitled to recover as for a taking, because respondent "did not, by the treaty, set aside any specific area for the exclusive use and occupancy by plaintiffs, and did not, by the treaty, recognize or acknowledge any exclusive use and occupancy right and title of the Indians to the whole or any portion of the acreage here claimed" (R. 75). In its context we interpret the first of these reasons to mean merely that respondent did not "set aside" a technical reservation with Indian agents, etc. for petitioners. Since we make no contrary contention the first reason assigned by the court is not in issue. This reduces the case to the second reason above assigned as to which this brief has been devoted. And since we have already shown that recognition of petitioners' rights in their lands was accorded by the Shoshone treaties, there remains only the question as to what lands were so recognized.

There should be no question that the land so acknowledged as that of petitioners is the land defined and described

by the territorial description of the treaty of Box Elder as supplemented by the territorial descriptions in the other Shoshone treaties. Taken together these descriptions set up the exterior boundaries of the land belonging to the entire Shoshone Nation and the parts belonging to each of the other four divisions leaving the balance within the exterior boundaries as belonging to the Northwestern Shoshones. This interpretation is corroborated by the Doty Map, which accompanied the treaties to the Senate and which is set forth in the findings of the court below (R. 55), as also by the map which the General Land Office prepared in 1939 based on the treaty provisions and recent surveys to show the areas recognized as being reserved by the different divisions of the Shoshone Nation (R. 74; Plf's Ex. 5 sent up to this Court with the record).

The reason Governor Doty, who drafted the treaties, did not include in the Northwestern Shoshone treaty a complete description of all of petitioners' lands but only that "claimed by Pokatello [one of petitioner chiefs] for himself and his people,"[82] is that he did not at that time

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[82]One reason why Governor Doty did insert the description of Pokatello's land, even though he could not then define all of Northwestern Shoshone territory, was that the junctions of important overland routes of travel and the roads to the gold mines in Idaho and Montana were located in the particular area occupied by Pocatello's band. While the overland routes passed through the area occupied by the other Northwestern Shoshones west of Raft River, many important crossroads were in the territory claimed by Pocatello's band as their native habitat. When he and his band joined with the other Northwestern Shoshone bands and their respective chiefs, it was a matter of major concern to fix the responsibility of Pocatello and his band for any depredations thereafter committed by the Indians in this particular territory; for Pokatello was one of the most warlike of the Shoshone chiefs. R. 51-54.

know the exact extent of country owned by all the Northwestern Shoshones. He had, however, already concluded the treaty with the Eastern Shoshones, which left the western boundaries of their lands undefined because there were no Shoshones from that part of country present. When he came to negotiate with the Northwestern Shoshones, he determined that Pokatello's band occupied the land directly west of the Eastern Shoshones. So he included in the Northwestern Shoshone treaties a description of the eastern boundary of Pocatello's land and inserted a provision whereby the boundaries set forth in the Eastern Shoshone treaty were confirmed. This had the effect of defining and closing the western boundary of the Eastern Shoshonees. Later on when he negotiated with the Shoshonee-Goships on the south, the Western Shoshones on the southwest and the Mixed Bands on the north, he determined the boundaries existing between them and the Northwestern Shoshones. There is of course no doubt that the documents here in question were contemporaneous, related instruments, in *pari materia* and should be considered and construed together.[83]

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[83]It has long been recognized that "all acts in *pari materia* are to be taken together as if they were one law." *United States* v. *Freeman*, 3 How. 556, 564, 565; *Bailey* v. *R. R. Co.*, 17 Wall. 96, 105-108; *United States* v. *Stewart*, 311 U. S. 60, 64. Nor is it necessary that the instruments should in terms refer to each other if in point of fact they are related instruments. *People* v. *Cowan*, (1918) 283 Ill. 308, 315, 316, 119 N. E. 335; *Bailey* v. *R. R. Co.*, *supra*. This is particularly true where they relate to the same subject, or to the same class of persons, or have a common purpose, for they are in *pari materia*. See *United States* v. *Stewart*, *supra*; *Richardson* v. *Harmon*, 222 U. S. 96, and *Chott* v. *Ewing*, 237 U. S. 197. Indeed, it has been held that where two statutes are in *pari materia* and one contains provisions omitted from the other, the omitted provisions will be applied in a proceeding

It therefor is immaterial that the entire description of Northwestern Shoshone country is not contained in the Box Elder Treaty, but is taken from all the treaties together and the contemporary map of the Commissioner on the part of the United States. In *Spalding* v. *Chandler*, 160 U. S. 394, this Court held that a valid reservation was created by a treaty which provided that certain Indians should have a perpetual place of encampment, but failed to describe the area reserved, which area remained undefined until a survey twenty-five years later delineated its boundaries. In that case the Court said:

> "But whether the Indians simply continued to encamp where they had been accustomed to prior to the making of the treaty of 1820, whether a selection of the tract afterwards known as the Indian Reserve was made by the Indians subsequent to the making of the treaty and acquiesced in by the United States government, or whether the selection was made by the government and acquiesced in by the Indians, is immaterial. * * * If the reservation was free from objection by the government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself. * * *" (pp. 403-404.)

In *Schulenberg* v. *Harriman*, 21 Wall. 44, 60, it was held that a governmental grant of land which did not de-

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under the act not containing such provisions. *Ketcham* v. *Board of Education*, (1927) 324 Ill. 314, 317, 155 N. E. 332; *People* v. *Cowan*, *supra*. The reason is that unless they are construed together the legislative program may not be completely and accurately carried out. These principles, applicable alike in the construction of contracts and statutes, are applied to the construction and interpretation of treaties. *Sullivan* v. *Kidd*, 254 U. S. 433, 439; *United States* v. *Choctaw Nation*, 179 U. S. 494, 531; *Hamilton* v. *Erie R. R. Co.* (1916), 219 N. Y. 343, 353, 114 N. E. 398 (Error dism. 248 U. S. 369).

scribe boundaries operated as a present transfer of title although subsequent proceedings were necessary to determine the land, title to which was passed. See also *Fremont* v. *United States*, 17 How. 542, 558-9. Likewise, a treaty can establish rights to territory even though a description of boundaries is omitted. *Wilson* v. *Shaw*, 204 U. S. 24. In that case it was contended that the United States was without power to construct the Panama Canal because its treaty with Panama was deficient in several respects—one being that the boundaries of the Panama Canal Zone were not set forth in the treaty. This Court held:

> ". . . It is hypercritical to contend that the title of the United States is imperfect, and that the territory described does not belong to this nation, because of the omission of some of the technical terms used in ordinary conveyances of real estate.
>
> "Further, it is said that the boundaries of the zone are not described in the treaty; but the description is sufficient for identification, and it has been practically identified by the concurrent action of the two nations alone interested in the matter. The fact that there may possibly be in the future some dispute as to the exact boundary on either side is immaterial. Such disputes not infrequently attend conveyances of real estate or cessions of territory. Alaska was ceded to us forty years ago, but the boundary between it and the English possessions east was not settled until within the last two or three years. Yet no one ever doubted the title of this Republic to Alaska."

Here, of course, the boundaries of petitioners' land are identified by the provisions of the various treaties taken together. In such case, the courts have no right, irrespec-

tive of whether petitioners previously occupied the land in question, to ignore, amend or change these boundaries. *United States* v. *Brooks*, 10 How. 442; *Omaha Tribe of Indians* v. *United States*, 53 C. Cls. 549. In the *Brooks* case Caddo Indians by treaty with the United States reserved certain land for third parties, represented as being their friends. Subsequently, the United States sued to recover the reserved land on the ground that it was not at the time of the treaty occupied and possessed by the Caddo Tribe. The Court, however, refused to look beyond the language of the treaty and denied relief. In the *Omaha* case, the Indians, by treaty, ceded certain described land to the United States, reserving certain described land for themselves. Subsequently, the United States having taken the land reserved, the Indians sued for its value. The United States defended on the ground that the Indians "never owned" the land which they had ceded or reserved, and consequently "never had the right to cede the land to" the United States (p. 560). This defense was summarily rejected by the court which held that the boundaries stated in the treaty were conclusive. The court remarked that those making the treaty for the United States:

> "knew what the Omahas claimed; they knew that their possession and occupation of this land was considered with reference to their habits and modes of life; that the Indians had a right to the exclusive enjoyment of it in their own way until they abandoned the land or ceded it to the Government; their right of occupancy was considered as firmly established—this the treaty makers on behalf of the Government recognized when this treaty was made, and the defendants can not now be heard to say that the Indians did not own the land when the treaty was made and had no right to make a cession of it."

II

EXTERNAL AIDS TO CONSTRUCTION CONFIRM PETITIONERS' INTERPRETATION OF TREATY

A. Matters Leading up to Negotiation of the Treaties

As opposed to the holding of the court below that the United States by negotiating and entering into the Shoshone treaties did not recognize or acknowledge the Indian title of petitioners (R. 55-56, 65-66) even the history of events preceding their negotiation points in the direction of recognition.

As set forth in the statement of facts (*ante*, pp. 7-8) all of respondent's administrative officials concerned with the Shoshones (the local agent, the Superintendent of Indian Affairs for the territory of Utah, who had charge of Shoshone matters, and the Commissioner of Indian Affairs) recommended that treaties be entered into with Shoshones for the purpose of extinguishing their right of occupancy or "Indian title." Congress followed the recommendation to have a treaty negotiated but refused to follow the recommendation to extinguish the Indian title. Instead of purchasing the Shoshone country, it was decided to purchase rights of way over this country and pay a small amount for the driving away of buffalo and other game upon which the Shoshones existed.[84] By this method of approach, it was deliberately decided that the treaty to be negotiated should recognize the Indian title of the Shoshones to the lands claimed by them. This is plainly shown by the legislative history of the resolution authorizing the

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[84]Art. V of Eastern Shoshone treaty (R. 41) incorporated in northwestern Shoshone treaty by Art. II (R. 43).

treaty. The House Committee which reported on the resolution to "inquire into the expediency of making an appropriation to defray the expenses of making treaties in Utah," recommended an appropriation of only $20,000, which did not contemplate the purchase of the Shoshone land, but as explained by Senator Nesmith of Oregon was for "the purpose of quieting them and maintaining peace between them and the large population of miners who are now occupying a portion of *their country*, as well as *emigrants who are crossing the plains.*" (See note 19, *ante* p. 8.)

This maintenance of peace was to be accomplished by the peaceful purchase, at small cost, of rights of way over Shoshone land. Consequently, upon Congress authorizing the appointment of the treaty Commissioners (Act of July 5, 1862, 12 Stat. 512, 529) the Commissioner of Indian Affairs instructed the Commissioners that it was understood the Shoshones inhabited "the country in the northern part of Utah and eastern portion of Washington territories, through which lie the route of the overland mail, and the emigrant route through Utah and into Washington territory and it is mainly to secure the safety of the *travel along these routes* that a treaty is desirable." They were told that it was—

> "*not expected that the treaty will be negotiated with a view to the extinguishment of the Indian title to the land*, but it is believed that with the assurances you are authorized to make of the amicable relations which the United States desires to establish and perpetuate with them, and by the payment of Twenty thousand dollars of annuities in such articles as by the President may be deemed suitable to their wants for which you are authorized to stipulate, you *will be enabled to procure from them such*

articles of agreement as will render the routes indicated secure for travel and free from molestation; also a definite acknowledgment as well of the boundaries of the entire country they claim, as of the limits within which they will confine themselves, which limits it is hardly necessary to state should be as remote from said routes as practicable." (Italics added.)

Thus the plan to pay for rights of way carried with it an intent to recognize the title of petitioners to the land underlying such rights of way. The fallacy of the opinion of the court below lies in the assumptions that a treaty of peace and amity has nothing to do with a recognition of title and that Congress in providing for the acquisition of rights-of-way, and the Executive in negotiating the treaties, never intended to recognize the underlying title of those who were to grant the right-of-way. The only way that could have been done was by affirmatively providing that the acceptance of the desired rights-of-way did not constitute an acknowledgment of the underlying title.[84a] This was not done. The contrary argument—that in the absence of specific instructions affirmatively to recognize petitioners' title, it must be assumed there was no such recognition, —would place respondent in the untenable position of dealing sharply with its wards—a position respondent cannot in decency afford to take.

B. The Practical Interpretation of the Treaties

Petitioners' construction of the Shoshone treaties is also supported by the practical construction the treaty has received both administratively and legislatively.

[84a] See note 32, *ante*.

Subsequent recommendations to extinguish title. Administrative officials of the Government and legislature have persistently viewed the Treaty of Box Elder as establishing petitioners' rights to their lands. Thus, shortly after the Shoshone treaties were executed, the Commissioner of Indian Affairs, in annual report for 1863, reported:

> "* * * From the representations made by Governor Doty, we have reason to believe that those treaties have been entered into by the Indians with the sincere desire for peace, and I have no doubt that the friendly relations thus inaugurated may be maintained by wise and judicious action on our part. * * * Now that this desideratum has been attained, I respectfully recommend that measures be taken for the negotiation of *further treaties* with the Indians, *having for their object the extinguishment of their title to the soil*, and the setting apart of a suitable portion of the public domain upon which they may be concentrated; and so provided for that they need not be compelled to resort to plunder in order to sustain life." (Italics added.)[85]

Two years later, Congress, by Act of February 23, 1865, 13 Stat. 432, authorized the President to enter into treaties with the various tribes of Indians in Utah Territory to provide "for the absolute surrender to the United States, by said Indians, of their possessory right to all the agricultural and mineral lands in said territory except such agricultural lands as by said treaties may be set apart for reservations for said Indians" (Fdg. 22, R. 58-59). Although this was an admission by both the Commissioner of Indian Affairs and Congress that the respondent had rec-

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[85] *Ann. Rep. Comm'r. Ind. Affs.* (1863), pp. 37, 38; appendix, pp. 18-19.

ognized petitioners' title and that petitioners' land could not thereafter, without breach of the government's treaty obligations, be taken without petitioners' consent (or the payment of compensation), no further treaty or agreement was ever negotiated, made, or attempted to be made, with the petitioner bands of Shoshone Indians, or any of the other bands of the Shoshone Tribe, other than the Eastern Bands of the Shoshone Tribe with which a treaty was made July 3, 1868, ratified February 16, 1869, and proclaimed February 24, 1869 (15 Stat. 673) (R. 59). For the taking by respondent of these substituted lands, the Eastern Shoshones recovered in *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming* v. *United States*, 299 U. S. 476; 304 U. S. 111.

Admissions by Administrative Officers of Treaty Recognition.

Even after this suit was started, the administrative officers having to do with Shoshone lands admitted that Shoshone ownership was recognized by the Shoshone Treaties. The Secretary of Interior in his report to the Attorney General in this case, pursuant to the Act of June 25, 1868, C. 71, 15 Stat. 76, § 6, 5 U. S. C. § 91, which requires the administrative departments to report on cases pending in the Court of Claims, which report was filed as evidence by respondent, states that the territory of the Shoshones "was recognized by the United States as belonging to the various bands of Shoshone Indians by the treaties of July 2, 1863 (18 Stat. L., 685), July 30, 1863 (13 Stat. L., 663), October 1, 1863 (18 Stat. L., 689), and July 3, 1868 (15 Stat. L., 673)" (R. 84); again the "Government recognized all the land as belonging to the Northwestern bands

of Shoshones" (R. 92). The Commissioner of the General Land Office in reporting to the Secretary of Interior referred to the land described in the Box Elder treaty as the "land in the States of Utah and Nevada within the boundaries of the Shoshoni Indian Reservation (Northwestern Band), Treaty of July 30, 1863 (13 Stat. 663)" (R. 98).

The Court erred in excluding certain documents bearing on Administrative Construction.

At the argument of the case below (which is known as the trial) petitioners, in accordance with a practice that had grown up in the Court of Claims, offered in evidence certified copies of certain correspondence between Senator D. Worth Clark of Idaho and the Department of Interior as showing admissions by that Department of treaty recognition of petitioners' title. The court permitted the correspondence to be filed; and petitioners therefore understood, in accordance with the usual practice, that it was in evidence. When petitioners applied, however, for a transcript of the record, petitioners were informed for the first time that this correspondence had been excluded (R. 82) Petitioners were, however, allowed an exception and the evidence thus offered is printed in the record (R. 103-114).

The evidence was excluded by the court in chambers without any notice thereof being given on the ground that respondent did not have opportunity "to meet and answer," "by examination of witnesses or the offer of other evidence, any statements or alleged facts therein contained." Since, however, the documents were offered merely to show administrative interpretations of the Shoshone treaties, which were not printed in any public documents, it is submitted they should have been received.

A summary of those documents, which clearly show that the Department of Interior interpreted the Shoshone Treaties as recognizing title of petitioners, follows:

On April 20, 1939, Senator Clark wrote Secretary of Interior Ickes as follows (R. 113):

> "In order that I may be better advised in connection with pending legislation as to the claims of the Bannock and Shoshone Indians, many of whom are now located in my state, I would appreciate your having prepared for me by one of your map experts a map showing the lands set apart for each of the five divisions of the Shoshone Nation by five treaties negotiated in 1863."

On May 12, 1939, William Zimmerman, Jr., Assistant Commissioner of Indian Affairs, transmitted the request of Senator Clark to Hon. Fred. W. Johnson, Commissioner of the General Land Office. In his letter of transmittal, Assistant Commissioner Zimmerman said (R. 105-6):

> "While the areas described in the treaties were recognized as being in the possession of the Shoshone Indians, and no part, except that recognized as Eastern Shoshone land, was ever ceded to the United States, it was practically all disposed of as public lands of the United States. No accurate maps of the lands so recognized and so disposed of by the United States have ever been constructed.
>
> "A careful study has been made of the calls of the treaties, and a description thereof has been prepared in the light of information available to this Office for both the exterior and the interior boundaries. A copy thereof is transmitted for what it may be worth in assisting your office in the construction of the map."

The map was prepared and transmitted by the Assistant Commissioner of the General Land Office to the Commissioner of Indian Affairs (R. 104-5). The Acting Secretary of Interior then forwarded the map to Senator Clark under a letter of transmittal reading in part as follows (R. 103-4):

> "In further reference to your letter of April 20, in which you requested preparation of a map showing lands set apart for the Shoshone Indians under each of the five treaties in 1863 with the various divisions of the Nation, there is enclosed a map prepared in answer thereto.
>
> "The map was prepared in the General Land Office and follows closely the call of the treaty as formerly interpreted by Governor Doty. There is enclosed a copy of a letter from the Assistant Commissioner, Office of Indian Affairs, to the Commissioner of the General Land Office of May 12 in which certain information was furnished and citations were given to documents from which the lines were more readily determined. There is also enclosed a copy of the letter from the Assistant Commissioner of the General Land Office to the Commissioner of Indian Affairs transmitting the map to that Office.
>
> "In addition to the citations mentioned in the letters between the two Offices above-mentioned, access was had to certain maps and documents from the Geological Survey in determining the dividing lines between the different bands of the Nation, parties to these various treaties." (R. 103)

The above letter should have been admitted since it identifies the map (Plf's Exhibit 5) which was admitted without objection and is in the record (Item 4[g], R. 81), and shows the interpretation given the treaty by those charged

with management of our Indian affairs. There was and is no doubt that copies of documents certified by the Indian Office are evidence equally with the originals. 25 U. S. C. § 6. Evidence, outside the treaty, is admissible to show the meaning attributed by the Indians to the language chosen. *Jones* v. *Meehan*, 175 U. S. 1. How much more must that evidence be admissible where it shows what the government officials themselves understand to be the meaning, and where that understanding is adverse to the construction given by the government in defense of a suit on the treaty.

But even if the above letters could not be regarded as "evidence" in the ordinary sense, since offered merely on the question of administrative interpretation of the meaning of the treaties and not as proof of a disputed fact, as is adversary evidence, still this Court should take judicial notice of them, as administrative interpretations. In this respect, they are no different than the unreported opinions of a court, which this and other courts habitually receive for the assistance they may give in the determination of a mooted question of law. If this correspondence were printed in an official government document, it could be cited in briefs without being introduced in evidence. It should have the same status here, since there is no question as to its authenticity in the light of the certification of the copies.

III

PURPORTED FINDINGS OF FACT DO NOT PRECLUDE THIS COURT FROM PROPERLY INTERPRETING PETITIONERS' TREATY

The court below incorporated its interpretations of the treaty in the form of findings of fact. By Finding 15, R. 55, the court below in varying language purported to find

as a "fact" that the United States did not by the treaty of Box Elder negotiate or agree with respect to any acknowledgment or recognition of petitioners' title,[86] and by finding 21, R. 58, that the United States did not intend to recognize or acknowledge petitioners' title, but on the contrary had ever exercised dominion and complete ownership over the land for which petitioners claimed compensation.[87]

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[86]Finding 15 reads in part as follows: "In negotiating and making these five treaties with the various groups or bands of Shoshone and Bannock Indians, the treaty commissioners representing the United States and the Indians did not negotiate or agree with reference to the acknowledgment by the United States of any exclusive use and occupancy right or title of the Indians to the territory to the extent described or claimed by them at the request of the treaty commissioners; nor did the treaty commissioners on behalf of the United States negotiate or agree with the Indians with reference to the relinquishment by the Indians of any claim which they might make or have with reference to any territory. It was not the purpose of the treaty commissioners to agree or acknowledge on behalf of the United States as to any rights or title to any territory or as to boundaries and they made no attempt to ascertain accurately the boundaries of any territory which the Indians may have actually occupied, possessed and used to the exclusion of other Indians or tribes of Indians. The matter of Indian use and occupancy rights or the extinguishment of any claim or right which the Indians might make or have to such use and occupancy, as a stipulation or acknowledgment in the treaties, did not enter into the negotiations and was left out of consideration in the drafting and making of the treaties in question" (R. 55-6).

[87]Finding 21 reads as follows: "Prior to and at the time of the making and the ratification of the treaty with plaintiff bands of the Shoshone Indians, the United States had not recognized and did not, at that time, recognize a right of exclusive use, occupancy, and possession in plaintiff bands as against the United States to any territory which was within the Mexican Cession and included in that described by Pocatello, and now claimed by plaintiff bands. The treaty of July 30, 1863, with plaintiff bands contained no express or implied stipulation of recognition or acknowledgment by the United States of any right, title, or interest

Clearly, the question of whether the United States recognized or intended to recognize petitioners' title (presented by both findings 15 and 21) is ascertainable only by an interpretation of the treaty which is exclusively a matter of law reviewable by this Court. *Jones* v. *Meehan*, 175 U. S. 1, 32 (and cases cited), wherein it was held that a treaty with the Red Lake and Pembina bands of Chippewa Indians granting a "reservation" of 640 acres for the Chief Moose Dung, conveyed the land in fee simple, rather than conveying a mere right of occupancy. Or, as was held in *Utah & N. R. Co.* v. *Fisher*, 116 U. S. 28, 32-33, in the face of both a stipulation of the parties and a finding of fact by the trial court that certain lands were within the boundaries of and upon an Indian reservation, "The stipulation and finding must, however, be read with reference to the legislation of congress" and could not be accepted "as to an alleged fact which that legislation shows does not exist." See, also, *Bell* v. *Bruen*, 1 How. 169, 183.

But even if it were a mixed question of law and fact, there has been brought to this Court under the provisions of the Act of May 22, 1939, c. 140, 53 Stat. 752, all "those portions of the original records * * * material to the errors assigned" (R. 82). In addition, the court below takes judicial notice of evidence appearing in public documents

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in any land, and the United States, in making and ratifying the treaty, did not intend that it should be a stipulation of recognition and acknowledgment of any exclusive use and occupancy right or title of the Indians, parties thereto. On the contrary, the United States has ever exercised dominion and complete ownership over the territory and land for which plaintiff bands now seek to recover compensation. The treaty was intended to be, and was, a treaty of peace and amity with stipulated annuities for the purposes of accomplishing those objects and achieving that end" (R. 58).

generally available, such as communications appearing in reports of the Commissioner of Indian Affairs (*Temple* v. *United States*, 248 U. S. 121, 130) and, under the settled rule (*Hanley* v. *Donoghue*, 116 U. S. 1, 6-7), this Court will take judicial notice of facts which are within the judicial knowledge of the court being reviewed. There is, therefore, no inhibition of a jurisdictional nature which prevents this Court from examining the very substance of all the matters asserted. And this evidence we submit is all against the holding of the court below.

The further finding of the court (Fdg. 21, R-58), that "the United States has ever exercised dominion and complete ownership over the territory and land for which plaintiff bands now seek to recover compensation" is clearly wrong as a matter of law. "Dominion" in the sense of sovereignty dates from the time that the United States was recognized as the new sovereign by the former sovereigns—in the case of petitioners' land located in Idaho, this occurred upon consummation of the Oregon Treaty of June 15, 1846, with Great Britain (9 Stat. 869); in the case of petitioners' land located in Utah and Nevada, this occurred upon the consummation of the Treaty of Guadalupe Hidalgo with Mexico February 2, 1848 (9 Stat. 922). But the only property interest in the land the United States acquired by these treaties was that of becoming the owner of the possibility of revertor called in Indian law, the "ultimate fee." The Indian title of all the land obtained from Mexico as well as that conceded by Great Britain, was preserved, as just recently reasserted by this Court in *United States of America, as Guardian, etc.* v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339. And respondent by entering into a treaty with these Indians, recognized rather than extinguished that title.

Granting that the United States has acted to dispose of the property to railroads, to states for schools, and for other purposes, and has set up forest reserves and reservations for other Indians,[88] it does not follow that it so acted because it felt petitioners had no title, even if such unilateral interpretation had any significance. We have set out above (p. 14) that the respondent's officers, following petitioners' treaty sought leave to extinguish petitioners' title in the only way in which that could be fairly done—by bilateral agreement of the parties to the treaty; and that Congress authorized negotiations to that end—which negotiations for some reason never were undertaken. This overcomes any inference that the United States had no idea that petitioners had a rightful title to the area.

Were the fact of exercise of "complete ownership" ever to be controlling, it would be impossible for an Indian tribe to recover for the taking of its lands. But the unilateral appropriation of the land does not either change the meaning of the treaties or destroy the rights of Indian tribes

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[88]Act of July 1, 1862, 12 Stat. 489; Act of July 2, 1864, 13 Stat. 356; and Act of July 27, 1866, 14 Stat. 492 (railroads). Enabling acts granted certain numbered sections to Idaho, Utah and Nevada for school and other public purposes; see Act of July 3, 1890, 26 Stat. 216 (Idaho); Act of July 16, 1894, 28 Stat. 107 (Utah) and Act of March 21, 1864, 13 Stat. 30 (Nevada). In connection with establishment of forest reserves, see Replies of Asst's Sec. of the Interior dated April 29, 1936, R. 96. See Executive order of June 14, 1867, establishing Fort Hall Indian Reservation, 1 Kappler 838. In March, 1868, the United States opened a land office for the Territory of Utah and soon thereafter began disposing of the lands under the homestead and other public-land laws. See Ann. Reps. Commr. G. L. O. 1868, pp. 63-68; 1869, pp. 168-174. For information concerning similar action with reference to Idaho and Nevada, see Ann. Reps. Commr. G. L. O. 1868, pp. 55-59, 59-63; 1869, pp. 163-168, 177-184.

thereunder. Once Congress passes a jurisdictional act, and the matter becomes subject to judicial determination, the Indians can recover for such breaches of agreement—not be denied recovery because of them. *United States* v. *Creek Nation*, 295 U. S. 103, 110; *United States* v. *Shoshone Tribe*, 299 U. S. 476, 496-498; *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119, 123. It follows that the breach cannot be taken as proof that there never was a contract recognizing the Indian ownership; that respondent cannot profit by its own wrong.

CONCLUSION

The United States, by the Shoshone treaties, recognized the Indian title of petitioners to certain land, and obtained rights of way over and easements therein, which it used to its benefit. The subsequent taking of such land by respondent was in derogation and violative of the recognition accorded by the treaties. Petitioners, therefore, as reported to Congress by the Secretary of the Interior, asserted "*under the treaties mentioned* * * * claims against the United States for large tracts of land in Northern Utah and Nevada, and in Southern Oregon and Idaho, and which lands, they allege, were disposed of by the Government without a cession by or consent of these Indians." (S. Rep. No. 519, 70th Cong., 1st Sess.) With this report of the Secretary of Interior before it, Congress authorized the Court of Claims to adjudicate any claim which petitioners "may have against the United States arising under or growing out of the treaty of July 2, 1863 [Northwestern Shoshone Treaty] * * *; treaty of July 30, 1863 [Eastern Shoshone Treaty] * *, and any subsequent treaty * *." (45 Stat. 1407;

Appendix p. 1.) Petitioners having established the case thus contemplated by Congress, are, under the applicable decisions of both this Court and the court below (involving similar jurisdictional bills), entitled to recover. *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, 304 U. S. 11; *United States* v. *Creek Nation*, 295 U. S. 103; *United States* v. *Klamath and Moadock Tribes*, 304 U. S. 119; *Fort Berthold Indians* v. *United States* 71 C. Cls. 308; *Assiniboine Indian Tribe* v. *United States* 77 C. Cls. 347; *Crow Nation* v. *United States* 81 C. Cls. 238; *Omaha Tribe of Indians* v. *United States* 53 C. Cls. 549.

The judgment below should be reversed.

Respectfully submitted,

ERNEST L. WILKINSON,
JOSEPH CHEZ,
Attorneys for Petitioners.

JOHN W. CRAGUN,
HERMAN J. GALLOWAY,
FRANK K. NEBEKER,
CHARLES J. KAPPLER,
CLINTON D. VERNON,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1944

No. 63

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS

Petitioners,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

APPENDIX

to

Brief for Petitioners

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JURISDICTIONAL ACT

ACT OF FEBRUARY 28, 1929, 45 STAT. 1407

CHAP. 377.—An Act Conferring jurisdiction upon the Court of Claims to hear, adjudicate, and render judgment in claims which the northwestern bands of Shoshone Indians may have against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and hereby is, conferred upon the Court of Claims, notwithstanding lapse of time or statutes of limitations, to hear, adjudicate, and render judgment in any and all claims which the northwestern bands of Shoshone Indians may have against the United States arising under or growing out of the treaty of July 2, 1863 (Eighteenth Statutes, page 685-2 Kappler, 848); treaty of July 30, 1863 (Thirteenth Statutes, page 863-2 Kappler 850); Act of Congress approved December 15, 1874 (Eighteenth Statutes, page 291), and any subsequent treaty Act of Congress, or Executive order, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

SEC. 2. That any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of the approval of this Act; and such suit shall make the northwestern bands of Shoshone Indians party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claims under contract with the northwestern bands of Shoshone Indians, approved by the Commissioner of Indian Affairs and the Secretary of the Interior as provided

by law. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys for said Indians to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said Indians.

SEC. 3. That in said suit the Court of Claims shall also hear, examine, consider, and adjudicate all claims which the United States may have against the said northwestern bands of Shoshone Indians. Any payment which may have been made by the United States, including gratuities for the benefit of any band or bands of said Indians or for their support and civilization, shall not operate as an estoppel, but may be pleaded as a set-off in said suit.

SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act an appeal may be taken by either party, as in other cases, to the Supreme Court of the United States.

SEC. 5. The Court of Claims shall have full authority by proper process and orders to bring in and make parties to such suit any and all persons deemed by it necessary or proper to the final determination of the matters in controversy.

SEC. 6. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he or some attorney from the Department of Justice to be designated by him is hereby directed to appear and defend the interests of the United States in such case.

SEC. 7. Upon final determination of such suit or suits the Court of Claims shall have jurisdiction to fix and determine a reasonable fee, not to exceed 10 per centum of the recovery, together with all necessary and proper expenses incurred in preparation and prosecution of the suit, to be

paid to the attorney or attorneys employed by said northwestern bands of Shoshone Indians, or any of them, and the same shall be included in the decree and shall be paid out of any sum or sums found to be due said bands.

SEC. 8. The balance of the proceeds of all amounts, if any, recovered for said northwestern bands of Shoshone Indians shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled thereto, and shall draw interest at the rate of 4 per centum per annum from the date of the judgment or decree and shall be subject to appropriation by Congress only for the health, education, and industrial advancement of said Indians.

ACT AUTHORIZING NEGOTIATION OF TREATY WITH THE SHOSHONES

Act of July 5, 1862, c. 135, 12 Stat. 512, 529 (Interior Department Appropriation Act for 1863):

* * *

For defraying the expenses of negotiating a treaty with the Shoshonees or Snake Indians, or so much thereof as may be needed, to be expended under the direction of the Secretary of the Interior, twenty thousand dollars.

* * *

ACT AUTHORIZING TREATIES TO EXTINGUISH PETITIONERS' INDIAN TITLE

Act of February 23, 1865, c. 45, 13 Stat. 432.

CHAP. 45.—An Act to extinguish the Indian Title to lands in the Territory of Utah suitable for agricultural and mineral Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assem-

bled, That the President of the United States be, and he is hereby, authorized, by and with the advice and consent of the Senate, to enter into treaties with the various tribes of Indians of Utah Territory, upon such terms as may be deemed just to said Indians and beneficial to the government of the United States: *Provided*, That such treaties shall provide for the absolute surrender to the United States, by said Indians, of their possessory right to all the agricultural and mineral lands in said territory except such agricultural lands as by said treaties may be set apart for reservations for said Indians: *And provided further*, That all such reservations shall be selected at points as remote as may be practicable from the present settlements in Utah Territory.

SEC. 2. *And be it further enacted*, That in agreeing with said Indians upon the amounts to be paid to them under the provisions of the treaties to be negotiated in pursuance of this act, care shall be taken to obtain from the Indians, to the greatest possible extent, their consent to receive for such payments agricultural implements, stock, and other useful articles, rather than money.

SEC. 3. *And be it further enacted*, That for the purpose of negotiating said treaties and carrying out the provisions of this act, making presents to said Indians, and defraying the necessary expenses incident to such negotiation, there is hereby appropriated, out of any money in the treasury of the United States not otherwise appropriated, the sum of twenty-five thousand dollars.

ANNUAL REPORT, COMMISSIONER OF INDIAN AFFAIRS FOR 1849

Pp. 66-68:

FORT BRIDGER, on Black's Fork of Green or Colorado river,

August 22, 1849.

SIR: We arrived here yesterday. Messrs. Vasques and Bridger are the proprietors, and have resided here and in these mountains for more than twenty five years. They are engaged as traders belonging to the American Fur Company. They are gentlemen of integrity and intelligence, and can be fully relied on in relation to any statement they make in regard to the different tribes, claims, boundaries, and other information in relation to the Utah and Sho-sho-nie tribes, and a small band of Parnacks, as they have, during their residence, been engaged in trade with them.

* * * * * *

Among the Sho-sho-nies there are only two bands, properly speaking. The principal or better portion are called Sho-sho-nies, or Snakes, who are rich enough to own horses; the others, the Sho-sho-coes, or Walkers, are those who cannot or do not own horses. The principal chiefs of the Sho-sho-nies are *Momo*, about forty-five years old, so called from a wound in his face or cheek, from a ball, that disfigures him; *Wiskin*, Cuthair; *Washikick*, Gourd-rattle, (with whom I have had an interview;) and *Oapichi*, Big Man. Of the Sho-sho-coes, *Augatasipa* is the most noted.

Both bands number probably over one thousand lodges of four persons each. Of the relative portion of each band no definite account can be given; for, so soon as a Sho-sho-nie becomes too poor to, or does not, own a horse, he is at once called a Sho-sho-coe; but as soon as a Sho-sho-coe can, or does, own a horse, he is again a riding Indian, and therefore a Sho-sho-nie. Their language, with the exception of

some *Patois* differences, is said to be that of the Comanche tribe. Their [Sho-sho-nies] claim of boundary, is to the east from the Red Buttes, on the North Fork of the Platte, to its head in the Park, De-cay-a-que, or Buffalo Bull-pen, in the Rocky mountains; to the south, across the mountains, over the Yan-pa-pa, till it enters Green or Colorado river, and then across to the Back bone, or ridge of mountains called the Bear River mountains, running nearly due west towards the Salt Lake, so as to take in most of the Salt Lake; thence on to the Sinks of Mary's or Humboldt's river; thence north to the fisheries, on the Snake river, in Oregon; and thence south, (their northern boundary,) to the Red Buttes, including the source of Green river—a territory probably three hundred miles square, most of which has too high an elevation ever to be useful for cultivation of any sort. * * *

* * * * * *

* * * How these people are to live, or even exist, for any great length of time, I cannot by any means determine. Their support has heretofore been mostly game and certain roots, which in their native state are rank poison, called tobacco root; but when put in a hole in the ground, and a large fire burned over them become wholesome diet. The Mormon settlement in the Salt Lake valley has not only greatly diminished their formerly very great resource of obtaining fish out of the Utah Lake and its sources, which to them was an important resource; but *their* settlement, with the great emigration there, and to California, has already nearly driven away all the game, and will unquestionably soon deprive them almost entirely of the only chances they have for food. This will, in a few years, produce a result not only disastrous to them, but must inevitably engage the sympathies of the nation. How this is to be avoided, is a question of much difficulty; but it is, nevertheless the more imperative on the government, not only to discuss, but to put in practice, some mode of relief for these unfortunate people— * * *

* * * * * *

Supposing the government will be prepared next summer to take some decisive step towards a regular system of intercourse with them, and with a view of enabling the government, as effectually as possible, to guard against the unfortunate results of the causes in operation for their entire starvation, a (few only of which I have mentioned, for want of time,) I have concluded so to arrange matters, before I leave, that both these nations [Utahs and Sho-sho-nies] will be able to send large delegations, if not most of the principal bands of their tribes, to a great council to be held *here* next summer, being not only by far the most convenient place for such a council, but is also where the principal agency ought to be established; and here, also, ought to be established the leading military post of these mountains--for which, hereafter, I shall give my views more at large.

I have suggested the matter of the great council to Washikick, the only principal chief I have seen, and he highly approves of the plan. I have already made such arrangements, through the assistance of Major Vasques, (Mr. Bridger not being at home,) that all of both tribes will be notified of my design to hold such a council; and as soon as I shall have your pleasure on the subject, (which I hope will be at an early day after I get to San Francisco, in November) I will then fix a time which will best suit the views of the department, (if it shall meet with your approbation, as I hope it will,) and will then cause them to be notified of the day, which must of necessity not be later than August, and not earlier than July, as any other months would not be convenient for them to attend. The Sho-sho-nies are reputed an honest and *sober* people, decidedly friendly to the whites; and, if proper agents are kept amongst them, they will be easily managed, if a fair support can be provided for them. Some of the objects which I have supposed might be gained by such counsel, you will easily perceive from what I have said above, and many others, of perhaps equal importance, may also be

accomplished. It is of great importance that these Utahs should be laid under obligations to cease their accustomed depredations on the whites and their property; and it is of greater importance to adopt some mode or other to save the Snakes from utter destitution, which in a year or two must inevitably take place, if things remain as they now are.

* * * * * *

JOHN WILSON.

Hon. T. Ewing,
Secretary of the Department of the Interior.

ANNUAL REPORT, COMMISSIONER OF INDIAN AFFAIRS FOR 1851

pp. 182-184:

Fort Laramie, September 21, 1851.

Hon. L. Lea, Commissioner of Indian Affairs.

Dear Sir: * * *

On my route to Utah I passed many trains of emigrants, some for Oregon, some for California, but mostly for Utah. I found many of them in great distress, from depredations and robberies committed by the Indians; some were robbed of all their provisions and even of the clothing on their backs; many had their stock stolen, &c.

* * * * *

The emigrants not being able to distinguish one tribe from another, were equally fearful when they arrived in the territory of the Shoshonees, or Snakes, whose country embraces a portion of Oregon Territory, a portion of Utah, and a portion of the St. Louis superintendency; they therefore continued their practice of corralling their stock, still apprehending danger.

The Indians below having been publicly invited to the treaty at Laramie, and, as I understood, would generally attend, I thought it advisable to endeavor to get the Shoshonees to attend also, believing that it would promote the interest of the country and the Indians, and greatly benefit the vast number of emigrants who were daily passing the road.

I believed, also, that it would not only meet the approbation of the Department, but that it was greatly desired to have them there, as the main route for emigration passed through their country. I was justified in this opinion from a conversation held with you on the subject of the Indians in Utah, in May last, at Washington, in which you expressed the wish that they, or as many of the tribes as could be got, should attend. Believing, therefore, that it would

be beneficial to the Indians and the country, and believing that it would secure to the emigrants peace and safety in traveling the country; in short, believing it to be my duty, when I reached the country of the Shoshonees I immediately hired an interpreter and guide, collected some of their chiefs and braves, and made arrangements to attend them to the treaty at Laramie. I then hurried to Salt Lake City, and reported to Governor Young, the arrangements I had made; it met with his approbation, and he ordered me to fulfil my engagements with the Indians.

I immediately returned, and met the village assembled on Sweet Water, about 50 miles east of the South Pass. On the 21st of August I had a talk with them, which resulted in their selecting 60 of their head men, fully authorized to act for the whole tribe; we arrived at Laramie on the first day of September.

I regret that Col. Mitchell so construes his powers and instructions as to exclude them from being parties to the treaty, believing that they are not properly in his superintendency, but that they belong to the superintendency of Utah. He has, however, expressed much gratification at their being here, and will give them presents with the rest of the Indians, which will be, I hope, satisfactory to them. They are a tribe who have been uniformly friendly to the whites, and seem to have great confidence in and respect for them.

* * * * *

* * * I find much excitement among the Indians, in consequence of the whites settling and taking possession of their country, driving off and killing their game, and in some instances driving off the Indians themselves.

* * * * *

I find, also, another class of individuals—a mixture of all nations—and although less powerful in numbers, equally injurious to the country and the Indians—these are a set of traders, called here *"Freemen,"* who are settled around and among the Indians; some have married among

them; all, however, have an influence, which is exerted to serve their particular personal interests. This is operating against the interests of the Indians and the country, and tends greatly to prevent the agents from doing that which is required by the Department.

* * * * *

I am of the opinion that it would be greatly beneficial to the interest of the Indians to have an agency established for the Shoshonee tribe, and located on Green river, at or near the ferry or crossing. It is on the main road, and is one of those places where the *"Freemen"* generally collect in the spring to prey upon the misfortunes and necessities of the emigrants. The Indians are consequently drawn there; and I am informed that they have induced Indians to drive off the stock of emigrants, so as to force them to purchase of the *"Freemen"* at exorbitant prices; and, after the emigrants have left, make a pretended purchase of the Indians for a mere trifle, and are ready to sell again to the next train that may pass, and who may have been served in the same manner. I think that a treaty with the various tribes of Indians in Utah would be productive of much good, if held immediately. It would have the effect of preventing depredations on their lands, quieting their excitement against the whites, and ultimately save the government from much trouble and expense. * * *

I have the honor to remain, very respectfully, &c.,

J. H. HOLEMAN

ANNUAL REPORT, COMMISSIONER OF INDIAN AFFAIRS FOR 1852

pp. 9-10:

At an early period in the last summer, the agent for the Indians in Utah undertook, with the approbation of the governor of the Territory, an expedition to the various tribes therein occupying the region west of the Great Salt Lake. The thoroughfare of travel to California and Oregon passes through their country, and the object of the expedition was to prevent a recurrence, if possible, of numerous and often fatal collisions between the emigrants and Indians. It seems to have been eminently successful, as no murders or robberies are reported to have been committed by these Indians during the present year. To give some idea of the immense travel along this route, and the consequent importance of conciliating the Indians, the agent states that in returning to Salt Lake, he passed on each of several days as many as three hundred wagons.

pp. 149-155:

GREAT SALT LAKE CITY,
Utah Territory, September 25, 1852.

SIR: The time has arrived when it becomes my duty to make to you my annual report. Since my report made to your excellency on the 30th of March, nothing occurred of importance until I left for the Humboldt and Carson valley, on the 12th May. * * *

* * * * *

I found the Indians on the whole route disposed to be friendly, or at least they professed to be so. Those I met with on this side of the Goose Creek mountains, about one hundred and eighty miles from this place, claimed to be of the Shoshonie tribe, and belonged to the band who reside in the neighborhood of Box Elder, some eighty miles north of this place. They professed to be on a hunting excursion, and on a visit to a portion of their tribe who reside in these

mountains; all of whom they reported friendly to the whites.

We subsequently met with a few scattering parties of this mountain tribe, generally called "Diggers," but who also claimed to be Shoshonies. They likewise professed friendship and great respect for the whites. After we arrived on the Humboldt, although there were many Indians to be seen in small parties, it was difficult to get a talk with them. Those, however, who we could prevail upon to meet us seemed remarkably friendly, and were much pleased with the kindness and friendship shown them by our company. They also claimed to be of the Shoshonie tribe. They seemed to be very poor, and unarmed, except with the bow and arrow. They said they had no wish to be at war with the whites, but that the whites were always at war with them; that they could not hunt or fish on the river but the whites were shooting them; that the whites would persuade them into their camps, professing great friendship, and, without any cause or offence on their part, would shoot them down. This conduct on the part of the whites, they said, was sometimes revenged by the Indians; but if the whites would let them alone, they would be glad, and would not disturb them in future. I had heard of several circumstances corroborating these charges, and was disposed to place some confidence in their statements. * * *

* * * * *

As I returned, in travelling up the Humboldt, I met but few Indians, and those I had great difficulty in getting a talk with. They had seen other Indians, who informed them that I had advised the Indians to keep off the road in order to prevent difficulties with the whites, and that they had generally done so. I met, upon an average, about three hundred wagons daily from the time I left the link [sink] of the Humboldt until I reached the Goose Creek mountains—a distance of upwards of four hundred miles. I inquired particularly in regard to

the conduct of the Indians. The almost universal reply was that they had seen but few Indians, all of whom appeared friendly disposed, and that the Indians on the route had been far less troublesome than the white men. Many of the emigrants expressed the opinion that the only difficulties which had occurred—and they were but few—had been the acts of white men. Since my return to this place all the information I have received justifies the conclusion that the Indians have complied with their promises made to me, and that the expedition has been of service in producing peace and quiet on this road. Up to this time I have heard of no depredations being committed by the Indians. All is peace and quiet on the route.

Having no authority to enter into any treaty stipulations with these Indians, all I could do was to see them, and by friendly means, and by distributing among them a few presents and some provisions, impress upon them the friendly disposition of the government towards them, and, if possible, quiet their hostile feelings towards the whites, and thereby prevent a recurrence of those scenes which have heretofore been so fatal to the emigration and so destructive to life and property. The Indians in this section of the Territory, although they appear to be in a wild and savage state, and have had but little intercourse with the whites, seem to have a very correst idea of the power and importance of our government. They were much pleased with the idea that the "Big Captain" of the whites, as they term the President, knew them, and was friendly disposed towards them. They received the presents I gave them in a manner peculiar to them; exhibiting the strongest evidence of their gratitude and respect.

* * * * *

I have the honor to be, very respectfully, your obedient servant,

J. H. HOLEMAN,
Indian Agent, Utah Territory.

His Excellency Brigham Young,
Superintendent Indian Affairs, Utah Territory.

ANNUAL REPORT, COMMISSIONER OF INDIAN AFFAIRS FOR 1861

p. 25:

The Shoshones, or Snakes, and the Flatheads, are wealthy and powerful, and can cause their hostility to the the remote settlers and the overland immigration to be severely felt. Hence, the pressing necessity of some speedy arrangement with them, which with the Snakes it is suggested should be (as a temporary measure) a treaty granting annuities in consideration of a right-of-way across their country.

pp. 134-136, 138:

OFFICE OF THE SUPERINTENDENT OF
INDIAN AFFAIRS,

Great Salt Lake City, Utah Territory, October 1, 1861.

SIR: In accordance with a regulation of the Indian department, * * * I have the honor herewith to transmit to you my first annual report.

* * * * * *

Too little attention, I am fearful, has heretofore been paid to the fact that there is very little game in this Territory, of any description, which the Indians can kill to keep them in food. There is no buffalo whatever that range in this Territory, and very few antelope, elk, deer, mountain sheep, or bear, and these only in certain localities.

Civilization seems to have had the same effect here as has been noticed elsewhere in this country since the first settlement by our forefathers, in driving before it the game natural to a wilderness, and the Indians complain bitterly that since the white man has come among them their game has almost entirely disappeared from their former hunting-grounds, and they are now obliged either to beg food from the white settlers or starve.

The driving away of the buffalo not only deprives them of their principal supply of food, but also of a great source of revenue and comfort in the skins, which they sold and used to keep them comfortable in cold weather.

I have had more applications from Indians for beef and flour since I have been here than anything else. They frequently come to me and fairly beg for some beef, to keep their squaws and papooses from starving.

Owing to the limited amount of money placed in my hands, I have been unable to entirely satisfy their demands, but I am confident that what I have distributed in that way has been a great deal more satisfactory to the Indians than three times the amount expended in any kind of trinkets usually disbursed by the department would have been.

The annual appropriation for this superintendency has, in my opinion, always been too small to allow the superintendent and agents to give that satisfaction to the Indians which their wants demand, and a proper regard for the rights and safety of the white settlers, by preventing depredations, requires.

* * * * * *

The establishment of the overland daily mail and telegraph lines, and their recent completion through this Territory—consummations of such vital importance to the people throughout the Union—renders it necessary that steps should be immediately taken by the government to prevent the possibility of their being interrupted by the Indians.

On this subject I have taken much pains to consult with most of the leading men connected with these great enterprises, and also with nearly all of the head chiefs of the Indians that range on their lines in this Territory, and have, after mature deliberation, come to the conclusion that the only manner in which this can be effected to the entire satisfaction and protection of all the parties concerned, is by a treaty between the United States and the tribes of Indians ranging in this superintendency.

In recent consultations or "talks" with the Wash-a-kee and Sho-kub, the head chiefs of the Shoshones or Snake Indians, Navacoots and Pe-tut-neet, chiefs of the Ute nation, and many of the sub-chiefs of both nations, I find that they are unanimously in favor of a treaty with the United States, and agree with me in considering that to be the only effectual way to check the stealing propensities of some of their Indians; and from information gleaned from them on various occasions, I have made the following memorandum in regard to the probable cost and effect of a treaty.

They express their willingness to cede to the United States all the lands they claim in this Territory, with the exception of reservations necessary for their homes; and ask, in return, that the United States shall make them annual presents of blankets, beads, paint, calico, ammunition, &c., with occasional supplies of beef and flour sufficient to make them comfortable, which I estimate can be done with a small addition to the usual appropriations.

They seem fully to understand the nature and effect of a treaty, and the chiefs agree to hold themselves responsible for any depredations committed by any of their bands, if a treaty should be made, by deducting the amount of damage done from the annuity paid them.

I cannot too strongly recommend this course to the department, and sincerely hope that it will meet with that prompt attention that, to my mind, the importance of the subject entitles it.

* * * * * *

I have the honor to be, very respectfully, your obedient servant,

HENRY MARTIN,
Superintendent.

Hon. Wm. P. Dole.
Commissioner of Indian Affairs, Washington, D. C.

ANNUAL REPORT, COMMISSIONER OF INDIAN AFFAIRS FOR 1863

pp. 37-38:

Treaties of amity and peace have been concluded with the Shoshones, of Utah and Nevada, as follows, viz: At Fort Bridger, July 2, 1863, by Governor Doty and Agent Mann, as commissioners on the part of the United States, and the eastern bands of said Indians; at Box Elder, July 30, by Governor Doty and General Connor, on the part of the United States, and the northwestern bands; and at Ruby valley, October 1, by Governors Doty and Nye, on the part of the United States, and the western bands. These Indians have long been a scourge to the citizens of Utah and Nevada, and a terror to the emigrants and travellers over the routes leading through those Territories. From the representations made by Governor Doty, we have reason to believe that those treaties have been entered into by the Indians with a sincere desire for peace, and I have no doubt that the friendly relations thus inaugurated may be maintained by wise and judicious action on our part. The scarcity of game in these Territories, and the occupation of the most fertile portions thereof by our settlements, have reduced these Indians to a state of extreme destitution, and for several years past they have been almost literally compelled to resort to plunder in order to obtain the necessaries of life. It is not to be expected that a wild and warlike people will tamely submit to the occupation of their country by another race, and to starvation as a consequence thereof. It was perhaps unavoidable that, in taking possession of these Territories, hostilities should ensue between our own people and the Indians, as the latter knew but little of the vast disparity between their resources and power and our own, and consequently would not listen to any reasonable propositions on our part. Much credit is due to General Connor and the forces under his command, for their prompt and efficient services in chastising these

Indians for their outrages and depredations upon the whites, and in compelling them to sue for peace. Now that this desideratum has been attained, I respectfully recommend that measures be taken for the negotiation of further treaties with the Indians, having for their object the extinguishment of their title to the soil, and the setting apart of a suitable portion of the public domain upon which they may be concentrated, and so provided for that they need not be compelled to resort to plunder in order to sustain life.

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p. 394:

SUPERINTENDENCY OF INDIAN AFFAIRS,

Utah Territory June 20, 1863.

SIR: Your letter of instructions in relation to the proposed treaty with the Shoshones, dated June 1, 1863, I have the honor to acknowledge, and to inform you that I shall proceed the coming week to Fort Bridger for the purpose of meeting the Shoshonees who are assembled there, some of whom I met on my late expedition, and of treating with them according to your instructions of the 22d of July, 1862, and of those now given.

Many of these Indians have been hostile, and have committed depredations upon the persons and property of emigrants and settlers, but now express a strong desire for peace. Agent Mann informs me that he is now feeding them under your authority; I therefore hasten to meet them, that some arrangement may be made by which they can with satisfaction return to their hunting grounds, and upon terms which shall secure peace hereafter, safety to the emigrants and travellers, and relieve the department from the expense now being incurred.

These are about one-third of the Shoshones with whom treaties may be held, and I shall endeavor to limit the ex-

penditures to the least amount to obtain the objects desired by government.

* * * * * * * *

The Shoshonee bands are scattered over so vast an extent of country that it will be necessary for the commissioners to meet them at several points. The whole nation can never be assembled without bringing them hundreds of miles.

Very respectfully, your most obedient servant,

JAMES DUANE DOTY,
Superintendent of Indian Affairs,
Utah Territory.

Hon. Wm. P. Dole,
Commissioner of Indian Affairs.

pp. 395-396:

SUPERINTENDENCY OF INDIAN AFFAIRS,

Utah Territory, Great Salt Lake City, June 20, 1863.

SIR: I have the honor to acknowledge the receipt of your letter, dated May 22, 1863, in relation to my northern expedition, and to report:

That I returned to this city from that expedition on the 19th instant, having been absent six weeks in the Indian country, and travelled over eight hundred miles. I accompanied General Conner to Snake River Ferry, two hundred miles, where we separated, and he proceeded with his cavalry up the Blackfoot river, and south across the dividing ridge to Soda Springs, at which he has established a military post, on the old California and Oregon roads. The Bannacks and Shoshones I met in small bands, and after consulting with them, I am satisfied they are disposed to be peaceable and friendly. The exhibition of a cavalry force among them apparently satisfied them that they could

be reached by the power of the government, and that they would certainly be punished if they committed depredations upon white men. There are, undoubtedly, as they say, some bad men among them, who will not be controlled by the chiefs, but efforts are made by the peaceable Indians to restrain them. The only bands that appear determined to continue hostilities were those of Pokatelo, Sagowitz, and Sanpitz, and with these I could obtain no communication. They must be left to General Conner's troops.

When at Snake River ferry, two express-men arrived, bringing information that a large body of Shoshonees and Bannacks were assembled at Kamash prairie, about one hundred miles further north, on the road used by emigrants to Bannack city, with the intention to either fall upon the miners on Beaver Head and its branches, or upon the emigrants along the road between South Pass and Bridger. If this could be prevented by an interview, I felt it my duty to make the attempt, and therefore proceeded with my interpreter to the place indicated to meet them. At Kamash prairie I found but a few Indians—those remaining stating that those who had been there had gone in different directions to the mountains to hunt, and that they were all friendly to the whites, and disposed to be peaceable. They complained of the white men at Bannack city firing upon them in the streets of that place, when they were there upon a friendly visit, and molesting no one, and killed their chief, Shanog, and two others. They said they did not intend to revenge this wanton act, because it was committed by men who were drunk, and they thought all the people there were drunk at that time. I advised them not to go there again, and to keep away from drunken white men; to be kind, and render good service to the emigrants along the road, and that they would be generously rewarded. I gave them a few presents of blankets, &c. However, fearing there might be trouble from this gross attack, and that other bands might not be disposed to overlook it, I determined, as there was no Indian agent in this section of

country, to proceed to Bannack city, about eighty miles distant, to ascertain the truth of their statement, and to counsel with those who might be along the road through the mountains. On entering the mountains I encountered a large band of Shoshonees, who manifested a friendly spirit, expressed a desire to be at peace, and thankfully accepted the few presents I was able to make them. On arriving at Bannack I learned with regret that the statement by the Indians of the murder of their people was true; that they were fired upon as they were sitting quietly in the street, by a dozen white men, and that their sole object in visiting the place was to give up a child—which they did—which had been demanded of them on the supposition that it was a stolen white child. I saw the child, and have no doubt that it is a half-breed, and was rightfully in their possession. I would have adopted legal measures for the punishment of these offenders, but there were no civil officers there, and no laws but such as have been adopted by miners. The matter must rest until the organization of the government of Idaho.

Whilst at Bannack, I ascertained that bands of Flatheads had passed on the road by which I came, in search of the Bannacks and Shoshonees, for the purpose of stealing their horses and making war upon them. Deeming it unsafe to return alone, I employed Mr. Dempsey, an excellent interpreter, to send a guide and guard of Indians with me. These accompanied me faithfully to the settlement of Box Elder, and will, on their way back, give useful information to those of their nation they meet.

All the Indians I met, during by absence, appeared desirous to form a treaty with the United States, and I told them that when the commissioners were ready to meet them I would send a runner to them to inform them of the time and place for them to assemble.

Very respectfully, your obedient servant,

JAMES DUANE DOTY,

Hon. William P. Dole,
Commissioner of Indian Affairs.

pp. 419-420:

SUPERINTENDENCY OF INDIAN AFFAIRS,

Utah Territory, Great Salt Lake City, October 24, 1863.

SIR: In compliance with the regulations of the Indian department, I have the honor to present the following annual report for the year 1863. Its earlier transmission was impracticable, having been engaged in the performance of my duties as commissioner to treat with the Shoshonees until this date.

* * * * * *

During the year 1862 and the winter months of this year many of the Indians in this superintendency manifested decided evidences of hostility toward the whites. The numerous murders and depredations upon property which they committed, as also their language, indicated a determination to stop all travel upon the overland routes and upon the roads leading to the gold mines in Idaho Territory. It became unsafe even for the Mormon settlers to go into the canons for wood; and the Bannack prophet said the Indians would combine and drive the white men from the country. This was his advice to the Shoshonee bands.

The battle with the Shoshonees on the Bank of Bear river in January, and the subsequent engagements with the Utahs on Spanish Fork, and with the Goaships in their country, effectually checked them, and severely and justly punished them for the wanton acts of cruelty which they had committed. The fight on Bear river was the severest and most bloody of any which has ever occurred with the Indians west of the Mississippi. One band (that of Sanpitz) was almost exterminated. It struck terror into the hearts of the savages hundreds of miles away from the battle-field.

As soon as it was ascertained that any of the bands were inclined to peace they were met by General Connor and myself at places selected in their own country, and treaties of peace and friendship entered into with them—a service which, in some instances, was regarded as both difficult and hazardous. These negotiations have been communicated

to the department from time to time as they occurred, as also other treaties formed by Governor Nye, Agent Mann, and myself, with the eastern and western bands of Shoshonees. These treaties could not have been made without the aid of the appropriations made by Congress for this superintendency, which have been wholly applied to the great object of restoring peace; and also to the presence of the military, who have rendered distinguished and lasting service to the government in subduing the Indians throughout this Territory.

It appears now as though peace was again permanently established with all of the tribes in this country, and that no danger from them is to be apprehended by emigrants moving in trains or singly, nor of an interruption in future to the overland stage or telegraph lines. They now acknowledge the Americans are the masters of this country. But peace can only be secured by regular, liberal, but just appropriations, and by the continuance of a strong military force upon the main routes of travel through this city, and especially on the routes north of it.

It was only by the judicious application of the appropriations made by Congress at its last session for the Indians in Utah that this department has been so successful in restoring peace, not only throughout this Territory, but in the southern part of Idaho also. It is believed that Congress will not be called upon for like appropriations again if the treaties are ratified and the goods required for the annuities are purchased and forwarded from the Missouri river early in the spring. It must be observed that it will take about three months' time to transport them to the places where they are to be distributed. If this is done, this country can be prospected for its minerals, and the northern gold mines worked with safety and increased advantages.

Very respectfully, your most obedient servant,

JAMES DUANE DOTY,
Acting Superintendent.

HON. WILLIAM P. DOLE,
Commissioner of Indian Affairs.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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589217—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 915

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The first opinion (R. 63–76) of the Court of Claims is reported in 95 C. Cls. 642. The second opinion (R. 77) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered January 3, 1944 (R. 79). The petition for a writ of certiorari was filed April 21, 1944, an extension of time having been granted (R. 115). The jurisdiction of this Court is invoked

under section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 938, 939, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752 (28 U. S. C. sec. 288).

QUESTION PRESENTED

Whether the treaty of July 30, 1863, acknowledged the Northwestern Shoshone Bands of Indians to have exclusive possessory right or title as against the United States to the lands involved.

TREATIES AND STATUTE INVOLVED

The Northwestern Shoshone Treaty of July 30, 1863, appears in the record at pages 43–44. The Eastern Shoshone Treaty of July 2, 1863, the Western Shoshone Treaty of October 1, 1863, the Shoshonee-Goship Treaty of October 12, 1863, and the Mixed Bands Treaty of October 14, 1863, appear in the record at pages 40–42, 44–47, 47–49, and 49–51, respectively. The Jurisdictional Act of February 28, 1929, c. 377, 45 Stat. 1407, is set forth in the Appendix, *infra*, pages 19–21.

STATEMENT

Under authority of the Act of February 28, 1929, c. 377, 45 Stat. 1407, the Northwestern Bands of Shoshone Indians filed their petition in the Court of Claims on March 28, 1931, seeking to recover damages for the taking by the United States of lands alleged to have been secured to them by the Northwestern Shoshone Treaty (R. 1–24).

The findings of the Court of Claims (R. 27–62) disclose the facts to be these. The Shoshone Nation of Indians was located in the territories of Washington and Utah. This nation or tribe of Indians, together with affiliated bands of Bannock Indians, roamed over, occupied, and used as their abode a vast area of approximately 80,285,000 acres of land. The Shoshone and Bannock Indians claimed this area as their home to the exclusion of other tribes of Indians, which recognized the right of the Shoshone and Bannock tribes to the possession, occupancy and use thereof. The home of the Shoshones and Bannocks became a part of the states of Wyoming, Colorado, Utah, Idaho, and Nevada. Petitioners were a part of of the several bands of the Shoshone Nation of Indians. The territory petitioners claim to have occupied as their home consisted of 15,643,000 acres of land of which 6,067,000 acres are located in the southeastern part of Idaho, 6,389,000 acres in the northwestern corner of Utah, including the Great Salt Lake, and 3,187,000 acres in the northeastern corner of Nevada. The population of the Shoshone and Bannock Indians in 1863 was about 9,700. Petitioners' population was between 1,500 and 1,800. (R. 27–28.)

In the 1850's and earlier the Government knew practically nothing about the Indians who inhabited the region which became southern Idaho, eastern Oregon, northern Nevada, and northern

Utah, their tribal distinctions, racial affiliations, or the specific areas occupied by particular tribes or bands of Indians. The Shoshone tribe always desired to be peaceful and friendly to the whites and to the Government. As a tribe they never engaged in war with the United States. Between 1849 and 1863, however, some of the Shoshones of the Northwestern Bands caused white emigrants and the Government considerable trouble by depredations and warlike acts because of the driving away of game and the destruction of food supply. The destruction of game and other sources of food reduced the Shoshones, particularly the Northwestern Bands, to a condition of practical starvation, making it necessary for them to "steal or starve." (R. 28–29.)

The Government supplied these Indians with little or nothing in the way of food and supplies, although the United States' agents and Indian superintendents urged this as an effective way of bringing about peace and friendship with the Indians (R. 32). These agents and superintendents also urged the making of a treaty with the Shoshone tribe, which desired to be friendly, in order to provide for the Indians and for the safety of emigrants and settlers. The Commissioner of Indian Affairs and the Secretary of the Interior made similar recommendations to Congress. However, Congress took no steps to this end until 1862 when by the Act of July 5, 1862,

12 Stat. 512, 529, $20,000 was appropriated to defray expenses of making a treaty with the Shoshones, the Secretary of the Interior having reported to Congress that while the lands of the Indians were unfit for cultivation and would probably not be required for settlement for many years, a treaty was desirable because of "the control which the Government would thereby be enabled to exercise over them, by which additional security would be given to the settlers in the Territory, and to the Overland Mail and Telegraph Lines." (R. 32–33.)

On July 22, 1862, the Commissioner of Indian Affairs instructed the commissioners who had been appointed to negotiate a treaty with the Shoshones that the Government knew little of the country inhabited and claimed by the Shoshones but understood that it was the country "through which lies the route of the overland mail, and the emigrant route * * * and it is mainly to secure the safety of the travel along these routes that a treaty is desirable"; and that while the treaty would not be negotiated "with a view to the extinguishment of the Indian title to the land," the United States' assurances of a desire for amicable relations and the payment of $20,000 in annuities should enable them to procure from the Indians agreement for the security of the overland-mail and emigrant routes and "also a definite acknowledgment as well of the bound-

aries of the entire country they claim, as of the limits within which they will confine themselves, which limits it is hardly necessary to state should be as remote from said routes as practicable" (R. 33–35). Because the Shoshones were scattered over a vast extent of country, the treaty commissioners had difficulty in establishing contact with them and it became necessary to meet with their various bands under their various chiefs or headmen at several points (R. 35–39).

In 1863 treaties were concluded with various branches of the Shoshone tribe. The Eastern Shoshone Treaty of July 2, 1863 (R. 40–42) stipulated for peace and friendship between the Indians and the United States, the protection of the emigrant routes, the establishment of military agricultural settlements and military posts along those routes, and the protection of the telegraph and overland stage routes. It provided for the payment by the United States of annuities in articles suitable for the wants and condition of the Indians as compensation to the Indians for "the driving away and destruction of game along the routes travelled by whites, and by the formation of agricultural and mining settlements." The treaty also set forth a description of "the Shoshonee country, as defined and described by said nation." The Northwestern Shoshone Treaty of

July 30, 1863 (R. 43–44) also stipulated for peace and friendship, incorporated all of the provisions of the Eastern Shoshone Treaty, and provided for the payment of annuities. Article IV thereof stated that "The country claimed by Pokatello, for himself and his people, is bounded on the west by Raft River and on the east by the Porteneuf Mountains." Similar treaties were made with the Western Shoshones, the Shoshonee-Goship Indians, and the Mixed Bands of Shoshone and Bannock Indians (R. 44–51). Treaty Commissioner James Duane Doty subsequently indicated the exterior boundaries of the country claimed by the Shoshones and the limits of the territory occupied by the various branches of the tribe on a map furnished by the General Land Office (R. 51, 55). Of the treaties Commissioner Doty wrote to the Commissioner of Indian Affairs, as follows (R. 54):

> The importance of these treaties to the government and to its citizens can only be appreciated by those who know the value of the continental telegraph and overland stage to the commercial and mercantile world, and the safety and security which peace alone can give to emigrant trains, and to the travel to the gold discoveries in the north, which exceed in richness—at least in the quality of the gold—any discoveries on this continent.

Each of the treaties, except the Western Shoshone Treaty, was ratified by the Senate with the following amendment (R. 57):

> Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.

The various tribes or bands of Indians accepted their respective treaties as amended except the Mixed Bands of Shoshones and Bannocks which had become so scattered that they could not be assembled for the purpose of obtaining their formal consent to the amendment of their treaty. As to the Western Shoshone Treaty, the Senate first voted to ratify it with a similar amendment but subsequently voted to reconsider action on the treaty and finally ratified the treaty without amendment except as to the amount of annuities to be paid under the treaty (R. 57–58).

By Act of February 23, 1865, 13 Stat. 432, Congress authorized the President to make treaties with the various tribes of the Utah Territory for "the absolute surrender * * * of their possessory right to all agricultural and mineral lands in said territory except such agricultural lands as by said treaties may be set

apart for reservations for said Indians" (R. 58–59). However, no further treaties were made with these Indians except a treaty of July 3, 1868, with the Eastern Bands of the Shoshone Tribe by which those bands of Indians ceded all lands claimed by them except a reservation of 3,047,730 acres in the Wind River section of Wyoming which was set apart for their use and occupancy and for the use and occupancy of other Indians whom they might be willing to admit amongst them (R. 59). Following the treaty of July 30, 1863, the Northwestern Bands of Shoshone Indians became widely scattered over northern Utah and Nevada and southern Idaho. Diminished numbers of these Indians eventually found abode on various Indian reservations in Idaho, Wyoming and Nevada. (R. 60.)

In Finding 15 the Court of Claims specifically found (R. 55–56) that in negotiating the five treaties with the various groups of Shoshone and Bannock Indians, the treaty commissioners and the Indians did not negotiate for acknowledgement by the United States of any exclusive Indian title, nor for any relinquishment by the Indians of any territorial claims they might have; that it was not the purpose of the treaty commissioners to acknowledge any territorial claims on the part of the Indians, and the treaty commissioners made no attempt to ascertain accurately the territories which the Indians may

have actually occupied, possessed and used to the exclusion of other Indians; and that the purpose of the United States and the treaty commissioners was to bring about peace and friendship with the Indians by making provision for annuities in articles suitable to their wants and condition in order that the routes of travel by the whites through the country occupied by the Indians and the white settlements therein might be free from attacks and depredations by the Indians.

In Finding 21 the court below found (R. 58) that prior to and at the time of the Northwestern Shoshone Treaty of July 30, 1863, the United States had not recognized a right of exclusive use, occupancy, and possession in the Northwestern Bands as against the United States to any of the territory within the Mexican cession and included in the country described in the treaty; that the treaty of July 30, 1863, contained no express or implied stipulation by the United States as to any Indian right, title, or interest in any land, and the United States never intended by the treaty to make any such stipulation; and that, on the contrary, the United States "has ever exercised dominion and complete ownership" over the territory claimed by the Northwestern Bands of Shoshone Indians.

Upon these findings the Court of Claims concluded, as a matter of law, that petitioners were not entitled to recover under the treaty of July

30, 1863, as for a taking by the United States of any portion of the 15,643,000 acres of land for which they sought compensation (R. 62). Accordingly, judgment was entered dismissing the petition (R. 79).

ARGUMENT

1. Under the policy of the United States Indian possessory rights or "Indian titles" based on aboriginal occupancy were recognized within the Mexican cession as well as elsewhere. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 345–346. Hence, the case is the same as to the lands within and without the Mexican cession. It may be assumed that petitioners had "Indian title" to the whole or a part of the lands involved, *i. e.*, that they actually and as of right possessed, occupied, and used those lands to the exclusion of other tribes of Indians. See *id.* at page 345.[1] That petitioners may have had such title would not in itself authorize a recovery herein, since the

[1] Indian titles based on aboriginal occupancy have always been subject to the sovereign title of the United States. *Jones* v. *Meehan*, 175 U. S. 1, 8. Under governmental policy such titles were protected and could be interfered with or determined only by the United States. "The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable issues * * * And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347.

jurisdictional act of February 28, 1929, 45 Stat. 1407 (see Appendix, *infra*, pp. 19–21) does not extend to claims based on mere immemorial occupancy but only to those arising under or growing out of the treaties named. Cf. *Hayt* v. *United States, et al.*, 38 C. Cls. 455, 462; *Duwamish, et al. Indians* v. *United States*, 79 C. Cls. 530, 599, 600; *Coos Bay Indian Tribe, et al.* v. *United States*, 87 C. Cls. 143; *The Wichita Indians, et al.* v. *United States*, 89 C. Cls. 378, 420. Therefore, the question here is whether the petitioners acquired a right to those lands to the exclusion of the United States under the Northwestern Shoshone Treaty of July 30, 1863 (R. 43–44), and the Eastern Shoshone Treaty of July 2, 1863 (R. 40–42), which was incorporated therein.

The treaty of July 30, 1863 (R. 43–44) contained no acknowledgment in express terms that petitioners' Indian title was good as against the United States' title. Nor is such an acknowledgment implicit in the circumstances (R. 28–39) under which that treaty and the related Shoshone treaties were made. Those circumstances evidence that the sole purpose of the treaties was to establish peace and and friendship between the United States and the Indians; to furnish the United States knowledge of the boundaries of the country inhabited and claimed by the Indians; to free from Indian molestation and depredation the existing routes of travel and telegraph and overland

stage lines and the projected agricultural settlements and military posts and the railroad line in the Shoshone country; and to compensate the Indians for loss of game and other means of livelihood by payment of annuities in articles suitable for their wants and condition. See *supra,* pp. 6–10.

Although the Act of February 23, 1865, 13 Stat. 432 (R. 58–59) authorized treaties with the Indians of Utah Territory for the cession of their lands, and although such a treaty was made with the eastern Shoshones (R. 59–60), no such treaty was ever made with petitioners. Following the treaty of July 30, 1863, the Northwestern Bands of Shoshone Indians became widely dispersed over northern Utah and Nevada and southern Idaho (R. 60). They subsequently settled in small groups upon various Indian reservations in Idaho, Wyoming, and Nevada (R. 60). And the United States always exercised complete dominion and ownership over the territory for which they seek compensation (R. 58).

While Indian treaties are to be construed generously in keeping with the honor of the United States and doubtful terms and provisions are to be resolved in accordance with the understanding of the Indians, they may not be interpreted to impose an obligation on the United States which is clearly negatived by attending facts and circumstances. *United States* v. *Choctaw &c. Na-*

tions, 179 U. S. 494, 531–534; *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500; *Blackfeet et al. Nations* v. *United States*, 81 C. Cls. 101, 123. It follows that the treaty of July 30, 1863, was not intended to recognize a right in petitioners to the lands they claimed, good as against the United States.

2. Pervading petitioners' argument is the unjustified assumption that factual references to an aboriginal title are equivalent to recognition of a title valid as against the United States. Thus, they mention the description of the boundaries of the country claimed by petitioners in the treaty of July 30, 1863 (Pet. 12–13), the fact that Indian "claim" traditionally means Indian title (Pet. 13–14), the treaty commissioners' instructions not to negotiate the treaty with a view to extinguishment of petitioners' Indian title (R. 34, Pet. 14) and to obtain "a definite acknowledgment" of the territory petitioners claimed (R. 34, Pet. 14), and statements of administrative officials and legislation concerning petitioners' Indian title. They also refer to their own understanding that they had Indian title (Pet. 16). But that the Northwestern Bands of Shoshones may have had Indian title and the United States may have failed to extinguish it by treaty cannot, without more, be transformed into a title good as against the United States. Mention of the Indian boundaries in the treaty, particularly

in view of the Government's lack of and desire for knowledge of the Indians and the country they claimed (R. 28, 34), means no more than that by the treaty the Government sought and obtained information concerning the Indians and their habitats. While the Indians undoubtedly understood that their claim was of Indian title, the circumstances under which the treaty of July 30, 1863, was made (R. 29–39), as well as the subsequent conduct of the Indians (R. 60), refute the view that that treaty transmuted their aboriginal right into a right valid as against the United States.

The strongest argument in petitioners' favor is the provision of the treaty giving the United States the right to establish agricultural settlements and military posts in the Indians' territory and to construct the railroad line through it (R. 40–41, 43), but the contervailing evidence (R. 28–39) establishes that this provision was not so much one conferring rights in the Indians' country as one promising freedom from Indian molestation and depredation. The United States' later exercise of dominion and ownership over the territory petitioners claimed (R. 58) amounted to an extinguishment of petitioners' Indian title. Cf. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347. This together with the fact that the United States has never treated with petitioners for extinguishment of their title (R. 59),

indicates that the treaty of July 30, 1863, was not intended to acknowledge that petitioners' aboriginal title was valid as against the United States.

3. Contrary to petitioners' view (Pet. 17–20), the treaty of July 30, 1863, was not substantially the same as the Fort Laramie Treaty of September 17, 1851, involved in *Fort Berthold Indians* v. *United States,* 71 C. Cls. 308; *Assiniboine Indians* v. *United States,* 77 C. Cls. 347, appeal dismissed and certiorari denied, 292 U. S. 606; and *Crow Nation* v. *United States,* 81 C. Cls. 238. The object of the Fort Laramie Treaty was to put an end to internecine tribal warfare as well as to establish peace and amity between the tribes and the United States and to secure protection to white travellers. The boundaries of the "territories of" the several tribes were clearly described. "In what other way and for what other consideration could the commissioners have successfully accomplished their designed purpose than a governmental recognization of certain well-described lands as territory belonging to the Indians by right of occupancy?" *Fort Berthold Indians* v. *United States,* 71 C. Cls. 308, 315, 331.[2] The principal purpose of the

[2] But see *United States* v. *Northern Pacific Ry. Co.*, 311 U. S. 317, 347–349, where the court said the Fort Laramie treaty "did not alter the status" of the lands therein described or "create technical reservations as have many other treaties and acts of Congress."

Northwestern Shoshone Treaty, on the other hand, was to obtain freedom from Indian molestation and depredations against routes of travel; and payment of annuities was the chief means employed to accomplish that purpose. The boundaries of the "Shoshone Country" were not set out with precision, even in the Eastern Shoshone Treaty (R. 41).

Petitioners also err in believing that the decision below is in conflict with *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, with respect to lands within the Mexican Cession (Pet. 20–21). The *Santa Fe* case was not concerned with whether it was the United States' policy to recognize Indian possessory rights as against itself within the Mexican Cession. There this Court was dealing with a question of aboriginal title. Such a title may exist independently of "a treaty, statute, or other formal governmental action" (p. 347 of 314 U. S.), but that it exists does not mean that it is superior to the United States' title. See *Jones* v. *Meehan*, 175 U. S. 1, 8. In the grant involved in the *Santa Fe* case, the Government simply stipulated that the aboriginal title should prevail over the grantee's unless afterward extinguished by the United States. 314 U. S. at p. 344.

As petitioners state (Pet. 21–22), an Indian treaty, like an international treaty, may import recognition "of the territorial integrity of the

parties," but, since a mere Indian title is subordinate to the United States' title unless recognized as something more, an Indian treaty does not necessarily imply an acknowledgment that the Indian title is valid as against the United States. In alleging that the decision below seeks to "exalt the breach sued upon into proof that there was never any contract recognizing Indian ownership" by holding that petitioners' title was extinguished by the United States' subsequent exercise of complete dominion and ownership (Pet. 22–24), petitioners confuse aboriginal title with title valid as against the United States. The former was indeed extinguished; the question is whether the latter ever was created. The court below correctly held that it was not.

CONCLUSION

The decision below involves no conflict of decision or other question warranting certiorari, and is correct. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
NORMAN MACDONALD,
Attorney.

MAY 1944.

APPENDIX

The Act of February 28, 1929, 45 Stat. 1407, reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction be, and hereby is, conferred upon the Court of Claims, notwithstanding lapse of time or statutes of limitations, to hear, adjudicate, and render judgment in any and all claims which the northwestern bands of Shoshone Indians may have against the United States arising under or growing out of the treaty of July 2, 1863 (Eighteenth Statutes, page 685–2 Kappler, 848); treaty of July 30, 1863 (Thirteenth Statutes, page 863–2 Kappler, 850); Act of Congress approved December 15, 1874 (Eighteenth Statutes, page 291), and any subsequent treaty Act of Congress, or Executive order, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.
>
> SEC. 2. That any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of the approval of this Act; and such suit shall make the northwestern bands of Shoshone Indians party plaintiff and the United States party defendant. The petition shall be verified by

the attorney or attorneys employed to prosecute such claims under contract with the northwestern bands of Shoshone Indians, approved by the Commissioner of Indian Affairs and the Secretary of the Interior as provided by law. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys for said Indians to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said Indians.

SEC. 3. That in said suit the Court of Claims shall also hear, examine, consider, and adjudicate all claims which the United States may have against the said northwestern bands of Shoshone Indians. Any payment which may have been made by the United States, including gratuities for the benefit of any band or bands of said Indians or for their support and civilization, shall not operate as an estoppel, but may be pleaded as a set-off in said suit.

SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act an appeal may be taken by either party, as in other cases, to the Supreme Court of the United States.

SEC. 5. The Court of Claims shall have full authority by proper process and orders to bring in and make parties to such suit any and all persons deemed by it necessary or proper to the final determination of the matters in controversy.

SEC. 6. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he or some attorney from the Department of Justice

to be designated by him is hereby directed to appear and defend the interests of the United States in such case.

SEC. 7. Upon final determination of such suit or suits the Court of Claims shall have jurisdiction to fix and determine a reasonable fee, not to exceed 10 per centum of the recovery, together with all necessary and proper expenses incurred in preparation and prosecution of the suit, to be paid to the attorney or attorneys employed by said northwestern bands of Shoshone Indians, or any of them, and the same shall be included in the decree and shall be paid out of any sum or sums found to be due said bands.

SEC. 8. The balance of the proceeds of all amounts, if any, recovered for said northwestern bands of Shoshone Indians shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled thereto, and shall draw interest at the rate of 4 per centum per annum from the date of the judgment or decree and shall be subject to appropriation by Congress only for the health, education, and industrial advancement of said Indians.

Approved, February 28, 1929.

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CHARLES ELMORE CROPLEY
CLERK

No. 63

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,
PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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The opinion (R. 63–76) of the Court of Claims is reported in 95 C. Cls. 642.

JURISDICTION

The judgment of the Court of Claims was entered January 3, 1944 (R. 79). The petition for a writ of certiorari was filed April 21, 1944, the time for filing having been extended (R. 115), and was granted May 29, 1944. The jurisdiction of this Court is invoked under section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 938,

939, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752 (28 U. S. C. sec. 288 (b)).

QUESTION PRESENTED

Whether the Court of Claims correctly determined that the claim upon which the present suit is based did not arise under or grow out of the Treaty of July 30, 1863, as required by the Jurisdictional Act of February 28, 1929.

TREATIES AND STATUTES INVOLVED

The Northwestern Shoshone Treaty of July 30, 1863, appears in the record at pp. 43–44. The Eastern Shoshone Treaty of July 2, 1863, the Western Shoshone Treaty of October 1, 1863, the Shoshonee-Goship Treaty of October 12, 1863, and the Mixed Bands Treaty of October 14, 1863, appear in the record at pp. 40–42, 44–47, 47–49, and 49–51, respectively. The Jurisdictional Act of February 28, 1929, c. 377, 45 Stat. 1407, is set forth in the Appendix, *infra*, pages 31–33.

STATEMENT

Pursuant to the Act of February 28, 1929, c. 377, 45 Stat. 1407, which conferred jurisdiction on the Court of Claims to determine claims which petitioners might have against the United States "arising under or growing out of" the Northwestern Shoshone Treaty of July 30, 1863, and related treaties, petitioners brought suit in the Court of Claims on March 28, 1931, to recover

compensation for the alleged taking by the United States of lands claimed to have been secured to them by the Northwestern Shoshone Treaty (R. 1–24).

The Court of Claims found the facts as follows (R. 27–62):

The Shoshone Nation of Indians was located in the territories of Washington and Utah and, together with affiliated bands of Bannock Indians, roamed over and used as its abode a vast area of approximately 80,285,000 acres of land. The Shoshone and Bannock Indians claimed this area as their home to the exclusion of other tribes of Indians, and their claim was generally recognized by other tribes of Indians. The area they claimed as their home became a part of the states of Wyoming, Colorado, Utah, Idaho, and Nevada. Petitioners were a part of the several bands of the Shoshone Nation of Indians. The territory petitioners claim to have occupied as their home consists of 15,643,000 acres of land of which 6,067,000 acres are located in the southeastern part of Idaho, 6,389,000 acres in the northwestern corner of Utah, and 3,187,000 acres in the northeast corner of Nevada. The total population of the Shoshone and Bannock Indians in 1863 was about 9,700. Petitioners' population was between 1,500 and 1,800. (R. 27–28.)

In the 1850's and earlier the Government had practically no knowledge of the Indians who in-

habited the region which became southern Idaho, eastern Oregon, northern Nevada and northern Utah, their tribal distinctions, racial affiliations, or the specific areas occupied by particular tribes or bands of Indians. The Shoshone tribe always desired to be peaceful and friendly to the whites and to the Government. As a tribe they never engaged in war with the United States. Between 1849 and 1863, however, some of the Shoshones of the Northwestern Bands caused white emigrants and the Government considerable trouble by depredations and warlike acts because of the driving away of game and the destruction of food supply. The destruction of game and other sources of food reduced the Shoshones, particularly the Northwestern Bands, to a condition of practical starvation, making it necessary for them to "steal or starve". (R. 28–29.)

During this period the Government was supplying these Indians with little or nothing in the way of food supplies. Government agents and superintendents frequently went among these Indians, especially those inhabiting the routes of western travel, for the purpose of preserving peace, and as a means to that end gave the Indians presents which were gratefully received. These Indians professed friendship for the white people and the Government and showed a real desire for peace. They begged the Government agents for provisions and

supplies. Desiring to improve the condition of these Indians and to prevent attacks and depredations which were being committed on white emigrants by some of petitioner-bands of Indians because of the driving away of game and the destruction of their food supply, these agents constantly recommended to the Government that some provision be made to furnish them with the means to aid the Indians by giving them food and supplies, which would have the effect of bringing about peace and friendship with the Indians. They also urged the making of a treaty with the Shoshone tribe, which desired to be friendly, in order to provide for the Indians and for the safety of emigrants and settlers. The Commissioner of Indian Affairs and the Secretary of the Interior made similar recommendations. (R. 31–32.)

However, Congress took no steps to this end until 1862 when by the Act of July 5, 1862, 12 Stat. 512, 529, $20,000 was appropriated to defray expenses of making a treaty with the Shoshones, the Secretary of the Interior having reported to Congress that while the lands of the Indians were unfit for cultivation and would probably not be required for settlement for many years, a treaty was desirable because of "the control which the Government would thereby be enabled to exercise over them, by which additional security would be given to the settlers in the Territory, and to the

Overland Mail and Telegraph Lines" (R. 32–33).

On July 22, 1862, the Commissioner of Indian Affairs instructed the commissioners who had been appointed to negotiate a treaty with the Shoshones that the Government did not have sufficient knowledge to state definitely the boundaries of the country inhabited and claimed by the Shoshones but that they understood it was the country "through which lies the route of the overland mail, and the emigrant route * * * and it is mainly to secure the safety of travel along these routes that a treaty is desirable"; that while the treaty would not be negotiated "with a view to the extinguishment of the Indian title to the land," the United States' assurances of a desire for amicable relations and the payment of $20,000 in annuities should enable them to procure from the Indians agreement for the security of the overland mail and emigrant routes and "also a definite acknowledgment as well of the boundaries of the entire country they claim, as of the limits within which they will confine themselves, which limits it is hardly necessary to state should be as remote from said routes as practicable"; and that the treaty should be so framed as to express that while on the one hand the United States, being aware of the inconvenience to the Indians resulting from the driving away and destruction of game along the route travelled by whites, was willing to compensate them fairly for the same, the Indians on the other hand acknowl-

edged the stipulated annuities as a full equivalent therefor and pledged to refrain from depredations and maintain peacable relations with the United States and their citizens (R. 33–35). Because the Shoshones were scattered over a vast extent of country, the treaty commissioners had difficulty in establishing contact with them and it became necessary to meet with their various bands under their various chiefs and headmen at several points (R. 35–39).

In 1863 treaties were concluded with various branches of the Shoshone tribe. The Eastern Shoshone Treaty of July 2, 1863 (R. 40–42) stipulated for peace and friendship between the Indians and the United States, the protection of the emigrant routes, the establishment of military agricultural settlements and military posts along those routes, and the protection of the telegraph and overland stage routes. It provided for the payment by the United States of annuities in articles suitable for the wants and condition of the Indians as compensation to the Indians for "the driving away and destruction of game along the routes travelled by whites, and by the formation of agricultural and mining settlements." The treaty also set forth a description of "the Shoshonee country, as defined and described by said nation." The Northwestern Shoshone Treaty of July 30, 1863 (R. 43–44) also stipulated for peace and friendship, incorporated all of the provisions of the Eastern Shoshone Treaty, and

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provided for the payment of annuities. Article IV thereof stated that "The country claimed by Pokatello, for himself and his people, is bounded on the west by Raft River and on the east by the Porteneuf Mountains." Similar treaties were made with the Western Shoshones, the Shoshonee-Goship Indians, and the Mixed Bands of Shoshone and Bannock Indians (R. 44–51). Treaty Commissioner James Duane Doty subsequently indicated the exterior boundaries of the country claimed by the Shoshones and the limits of the territory occupied by the various branches of the tribe on a map furnished by the General Land Office (R. 51, 55). Of the treaties Commissioner Doty wrote to the Commissioner of Indian Affairs, as follows (R. 54):

> The importance of these treaties to the government and to its citizens can only be appreciated by those who know the value of the continental telegraph and overland stage to the commercial and mercantile world, and the safety and security which peace alone can give to emigrant trains, and to the travel to the gold discoveries in the north, which exceed in richness—at least in the quality of the gold—any discoveries on this continent.

Each of the treaties, except the Western Shoshone Treaty, was ratified by the Senate with the following amendment (R. 57):

> Nothing herein contained shall be construed or taken to admit any other or

> greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.

The various tribes or bands of Indians accepted their respective treaties, as amended, except the Mixed Bands of Shoshones and Bannocks which had become so scattered that they could not be assembled for the purpose of obtaining their formal consent to the amendment of their treaty. As to the Western Shoshone Treaty, the Senate first voted to ratify it with a similar amendment but subsequently voted to reconsider action on the treaty and finally ratified the treaty without amendment except as to the amount of annuities to be paid under the treaty. (R. 57–58.)

By Act of February 23, 1865, 13 Stat. 432, Congress authorized the President to make treaties with the various tribes of the Utah Territory for "the absolute surrender * * * of their possessory right to all agricultural and mineral lands in said territory except such agricultural lands as by said treaties may be set apart for reservations for said Indians" (R. 58–59). However, no further treaties were made with the Shoshone Indians except for a treaty of July 3, 1868, with the Eastern Bands of the Shoshone Tribe by which those bands of Indians ceded all lands claimed by them except a reservation of 3,047,730 acres in the Wind

River section of Wyoming which was set apart for their use and occupancy and for the use and occupancy of such other Indians as they might be willing to admit (R. 59).

Following the Treaty of July 30, 1863, the Northwestern Bands of Shoshone Indians became widely scattered over northern Utah and Nevada and southern Idaho. In 1873 the Commissioner of Indian Affairs appointed a commission to investigate all tribes and bands in this region, ascertain their number, and report on the possibility of gathering them upon one or more reservations where they could be more immediately under the care of the Government. After exhaustive investigation the commission reported that it had no trustworthy information as to the number of bands of Northwestern Shoshone Indians, and that a number of bands of these Indians had taken abode on various Indian reservations in Idaho, Wyoming, and Nevada. (R. 60.)

In Finding 15 the Court of Claims specifically found (R. 55–56) that in negotiating the five treaties with the various groups of Shoshone and Bannock Indians, the treaty commissioners and the Indians did not negotiate for acknowledgment by the United States of any exclusive Indian title, nor for any relinquishment by the Indians of any territorial claims they might have; that it was not the purpose of the treaty commissioners to acknowledge any territorial claims on the

part of the Indians, and the treaty commissioners made no attempt to ascertain accurately the territories which the Indians may have actually occupied, possessed and used to the exclusion of other Indians; and that the purpose of the United States and the treaty commissioners was to bring about peace and friendship with the Indians by making provision for annuities in articles suitable to their wants and condition in order that the routes of travel by the whites through the country occupied by the Indians and the white settlements therein might be free from attacks and depredations by the Indians.

In Finding 21 the court below found (R. 58) that prior to and at the time of the Northwestern Shoshone Treaty of July 30, 1863, the United States had not recognized a right of exclusive use, occupancy, and possession in the Northwestern Bands as against the United States to any of the territory within the Mexican cession and included in the country described in the treaty; that the treaty of July 30, 1863, contained no express or implied stipulation by the United States as to any Indian right, title, or interest in any land, and the United States never intended by the treaty to make any such stipulation; and that, on the contrary, the United States "has ever exercised dominion and complete ownership" over the territory claimed by the Northwestern Bands of Shoshone Indians.

Upon these findings the Court of Claims concluded that petitioners were not entitled to recover under the treaty of July 30, 1863, as for a taking by the United States of any portion of the 15,643,00 acres of land for which they sought compensation (R. 62). Accordingly, judgment was entered dismissing the petition (R. 79).

SUMMARY OF ARGUMENT

The Jurisdictional Act of February 28, 1929, c. 377, 45 Stat. 1407 (Appendix, *infra*, pp. 31–33) is limited to claims "arising under or growing out of" the Northwestern Shoshone Treaty of July 30, 1863. Cf. *Duwamish, et al., Indians* v. *United States*, 79 C. Cls. 530, 599–600, certiorari denied, 295 U. S. 755; *Coos Bay Indian Tribe, et al.* v. *United States*, 87 C. Cls. 143, certiorari denied, 306 U. S. 653; *The Wichita Indians, et al.* v. *United States*, 89 C. Cls. 378, 420. Petitioners cannot recover herein, therefore, unless the Treaty of July 30, 1863, is the source of the right of occupancy upon which the present suit is based.

The Court of Claims expressly found (R. 55–56, 58) that the primary purpose of the Treaty of July 30, 1863, was to establish peace and friendship between the Government and the Indians of the Shoshone Nation, and to free routes of travel from Indian molestation, in consideration of the payment of annuities, and that the Treaty was not intended to deal with the Indians' right of occupancy to the lands claimed by them. The

evidence amply supports this conclusion. Since the Treaty of July 30, 1863, neither acknowledged nor extinguished petitioners' asserted right of occupancy, the claim sued upon here is not one "arising under or growing out of" the Treaty.

ARGUMENT

THE COURT OF CLAIMS CORRECTLY DETERMINED THAT THE CLAIM UPON WHICH THE PRESENT SUIT IS BASED DID NOT ARISE UNDER OR GROW OUT OF THE TREATY OF JULY 30, 1863, AS REQUIRED BY THE JURISDICTIONAL ACT OF FEBRUARY 28, 1929

A. *The Jurisdictional Act of February 28, 1929, requires that petitioners' claim arise under or grow out of the Treaty of July 30, 1863.*—The present suit brought in the Court of Claims cannot be maintained unless petitioners' claim for compensation is one "arising under or growing out of" the Northwestern Shoshone Treaty of July 30, 1863, as required by the Jurisdictional Act of February 28, 1929 (Appendix, *infra*, pp. 32–34). The lands claimed to have been taken by the United States, therefore, must be held by right of occupancy derived from the Treaty, and not merely by right of occupancy based upon immemorial possession, or so-called Indian title. Cf. *United States* v. *Creek Nation*, 295 U. S. 103; *Shoshone Tribe* v. *United States*, 299 U. S. 476; *United States* v. *Shoshone Tribe*, 304 U. S. 111; *Fort Berthold Indians* v. *United States*, 71 C. Cls. 308; *Assiniboine Indians* v. *United States*, 77 C.

Cls. 347, appeal dismissed and certiorari denied, 292 U. S. 606; *Crow Nation* v. *United States,* 81 C. Cls. 238; *Duwamish, et al., Indians* v. *United States,* 79 C. Cls. 530, 599–600, certiorari denied, 295 U. S. 755. The language of the statute is clear and unambiguous. Congress plainly did not intend to authorize the Court of Claims to take jurisdiction of claims based solely upon immemorial possession, and not having their source in the Treaty. When Congress intends to authorize recovery on such claims, its legislation usually makes explicit provision therefor. Cf. *Coos Bay Indian Tribe, et al.* v. *United States,* 87 C. Cls. 143, certiorari denied, 306 U. S. 653; *The Wichita Indians, et al.* v. *United States,* 89 C. Cls. 378, 400; *The Indians of California* v. *United States,* 98 C. Cls. 583. Thus in the *Coos Bay* case, the jurisdictional act expressly permitted suits "arising under or growing out of the original Indian title, claim, or rights of the said tribes". Moreover, when Congress permits suits on claims based on immemorial possession, it is customary that the statute should define with reasonable exactness the area within which aboriginal rights may be asserted, thus limiting the extent of the United States' potential liability. The jurisdictional act in the *Coos Bay* case circumscribed by metes and bounds the area within which claims of original occupancy rights might be asserted. In *The Indians of California* case, the jurisdictional act

authorized recovery on claims for the loss of lands expressly delimited in the eighteen, unratified treaties with the California Indian tribes.[1]

Since the Jurisdictional Act extends only to occupancy rights derived from the Treaty of July 30, 1863, the taking by the United States of any aboriginal rights petitioners may have had in these lands can not be made the basis of recovery in this suit. To construe the Jurisdictional Act as permitting recovery on claims based solely on aboriginal title would expose the United States to a potential liability which Congress did not show

[1] Although the United States has several times submitted to suit on claims based solely on aboriginal title, it has not yet been determined that the United States is under any legal liability to compensate an Indian tribe for a deprivation of its aboriginal rights. The *Coos Bay* and *The Wichita Indians* cases, *supra*, denied recovery for want of proof of the claimed aboriginal titles. In *The Indians of California* case, the Court of Claims granted a recovery but this was on the basis of a provision in the jurisdictional act declaring that "the loss to the said Indians on account of their failure to secure the lands and compensation provided for in the eighteen unratified treaties is sufficient ground for equitable relief." *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, *Beecher* v. *Wetherby*, 95 U. S. 517, and similar cases, which declare that the United States' power over claimed Indian titles is plenary and its extinguishment of such titles raises no justiciable issues, make it problematical whether a deprivation of an aboriginal title will ground a legal liability on the part of the United States to make compensation, even where it has consented to be sued on such a claim. Since the Jurisdictional Act here involved is limited to treaty claims, the question is not reached in this case.

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that it intended to assume.[2] Not confining themselves to the meager territorial descriptions contained in the Northwestern Shoshone Treaty of July 30, 1863, petitioners set forth in their petition in the Court of Claims an elaborate definition of the territory claimed to have been held by immemorial occupancy (R. 17). Petitioners claim 6,255,000 acres west of Raft River—over one-third of the total number of 15,643,000 acres claimed in this suit—which admittedly are not even referred to in the Northwestern Shoshone Treaty. And, in their petition for a writ of certiorari, petitioners suggest that even though the Treaty of July 30, 1863, does not fix the area of their claimed domain, they should be permitted to submit proofs thereon. We submit, however, that Congress clearly intended that the Treaty

[2] "Tribal Indians claim by right of occupancy such vast and unlimited areas of lands * * * that had it ever been the political policy of the Government to accord them the same proprietary right that attaches to a title superior to that of occupancy, and open the courts to suits as and for their taking when thrown open to public settlement by the United States, Congress and the courts would have left open no doubts on the subject.

"Indian special jurisdictional acts, of which there are many, exemplify the established rule that resort to the courts by tribal Indians has always been restricted to adjudication of treaty rights and losses suffered by acts of Congress with respect thereto." *Dumarish, et al., Indians* v. *United States*, 79 C. Cls. 530, 599–600, certiorari denied, 295 U. S. 755.

alone should determine the extent of the liability assumed by the United States.[3]

B. *The Court of Claims correctly determined that petitioners' claim did not arise under or grow out of the Treaty of July 30, 1863.*—Indian right of occupancy is a question of fact depending on possession of a definite area of land to the exclusion of other tribes. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 399, 345. By the same token, whether the United States by treaty intended to acknowledge Indian right of occupancy to lands claimed by them is also a question of fact, at least where, as here, the answer depends upon consideration of the purpose of the Treaty, as disclosed by its historical background and subsequent practical construction by the parties.

The Northwestern Shoshone Treaty contained no provision whereby the United States acknowledged that petitioners had title by right of occupancy to the lands they claimed. Nothing in the circumstances surrounding the making of the Treaty suggests that the United States contemplated or the Indians understood that the Treaty

[3] The letter of the Secretary of the Interior proposing the legislation (S. Rep. 519, 70th Cong., 1st Sess., quoted in Petitioners' Brief, p. 17) is not inconsistent with the construction we place upon the Act. His characterization of petitioners' claims as being asserted "under the treaties mentioned" can hardly be regarded as equivalent to a considered judgment that such claims were derived from rights acknowledged by the Shoshone Treaties.

would deal with the question of the Shoshones' Indian title to any definite area of land. Thus, although in 1861 the Superintendent for the Utah Territory had advised the Commissioner of Indian Affairs that the Shoshones were willing to cede their claimed territory (R. 31), the Secretary of the Interior in the following year wrote to the House Committee on Indian Affairs, which was considering the desirability of entering into treaties with the Indians of Utah Territory with a view to purchasing their lands, as follows (R. 33):

> The lands owned by the Indians are, most of them, unfit for cultivation, and it is not probable that any considerable portion of them will be required for settlement for many years. The principal inducement to make treaties with those tribes is the control which the Government would thereby be enabled to exercise over them, by which additional security would be given to settlers in the Territory, and to the Overland Mail and Telegraph Lines.

And, following the Act of July 5, 1862, 12 Stat. 512, 529, appropriating $20,000 to defray the expenses of negotiating a treaty with the Shoshones, the Commissioner of Indian Affairs, on July 22, 1862, instructed the treaty commissioners that (R. 34):

> It is not expected that the treaty will be negotiated with a view to the extinguishment of the Indian title to the land, but it

> is believed that with the assurances you are authorized to make of the amicable relations which the United States desires to establish and perpetuate with them, and by the payment of Twenty thousand dollars of annuities in such articles as by the President may be deemed suitable to their wants for which you are authorized to stipulate, you will be enabled to procure from them such articles of agreement as will render the routes indicated secure for travel and free from molestation; also a definite acknowledgment as well of the boundaries of the entire country they claim, as of the limits within which they will confine themselves * * *

In accordance with these instructions, the provisions of the Treaty dealt only with the question of securing protection for routes of travel used by whites from Indian molestation in return for payment of annuities. The precise language used in the Shoshone treaties is noteworthy. The territorial boundaries set forth in the Northwestern Shoshone Treaty were those of "the country claimed by Pokatello, for himself and his people" (R. 44). The Eastern Shoshone Treaty similarly identified the Eastern Shoshone country "as defined and described by said nation" (R. 41). Nowhere in any of the Treaties did the United States acknowledge that the Shoshones owned by immemorial possession the lands described by the Treaties in these general terms.

Subsequent to the Treaty, the Northwestern Shoshones became widely scattered over northern Utah and Nevada and southern Idaho. In 1873 the commission appointed to investigate all the tribes and bands in this region was unable to obtain any reliable data as to the location or population of the Northwestern Shoshones. The commission found that some few (about 17) had gone to the Wind River reservation in Wyoming, which had been set apart in 1868 for the Eastern Shoshones; that others (about 400) had gone to the Fort Hall Indian reservation in Idaho; and that a number (about 300) had been assigned a small reservation in northeastern Nevada from which they were subsequently removed to the Western Shoshones' Duck Valley reservation in southwestern Idaho and northern Nevada (R. 60), making a total of about 700. By the Act of February 23, 1865, 13 Stat. 432, Congress authorized the President to make treaties with the various tribes of the Utah Territory for "the absolute surrender * * * of their possessory right to all the agricultural and mineral lands in said territory except such agricultural lands as by said treaties may be set apart for reservations for said Indians" (R. 58–59). Although the United States pursuant to this Act entered into the Treaty of July 3, 1868, with the Eastern Shoshones by which the latter ceded all the lands claimed by them except the 3,047,730

acres in the Wind River section of Wyoming which was set apart for their use and occupancy, no further treaties were made with the Northwestern Shoshones (R. 59). On the contrary, the United States always exercised complete dominion over the area petitioners claim to have owned by immemorial possession (R. 58).[4]

After considering the available evidence, the Court of Claims found that the Treaty of July 30, 1863, was not negotiated for the purpose of acknowledgment by the United States of petitioners' Indian title to the area claimed by them; that the treaty commissioners were not instructed and did not attempt to conduct any negotiations of this nature; and that, on the contrary, the primary purpose of the Treaty was to bring about peaceful and amicable relations between the United States and the Indians of the Shoshone Nation by making provision for the payment of annuities in goods and supplies so that routes of travel through the portion of the country occupied by the Shoshones might be free from attacks and depredations (R. 55–56). The Court of Claims also found that when the Treaty was made, the United States

[4] Petitioners' identity as "Northwestern Bands of Shoshone Indians" was practically lost in the 1880's (see R. 61–62). Extensive inquiry has failed to disclose even an estimate as to the present population of petitioner-bands of Indians. In event of recovery herein a special roll would have to be prepared to determine the identity and number of Indians comprising petitioner-bands.

had not recognized petitioners as having any Indian title to any of the territory within the Mexican Cession and included in the lands described in the Treaty by Pokatello and now claimed by petitioners; that the Treaty of July 30, 1863, contained no express or implied recognition by the United States that petitioners had any right or interest in any lands; that the "matter of Indian use and occupancy rights or the extinguishment of any claim or right which the Indians might make or have to such use and occupancy * * * did not enter into the negotiations and was left out of consideration in the drafting and making of" the Treaty; and that the United States has exercised dominion and complete ownership over the lands for which petitioners now seek compensation (*id*).

Petitioners contend that these findings are wrong as a matter of law, and that this Court should itself weigh the evidence and determine that the Treaty of July 30, 1863, was intended to and did acknowledge the Northwestern Shoshones' Indian title to the lands described therein. We submit, however, that the record furnishes ample support for the conclusion reached by the Court of Claims, and that petitioners have advanced no basis upon which this Court would be warranted in disturbing the findings made by the court below. Cf. *United States* v. *Sisseton and Wahpeton Bands of Sioux Indians*, 208 U. S. 561, 566; *United States* v. *Omaha Tribe of Indians*, 253 U. S. 275, 281, 283.

United States v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, holding that the traditional policy of the United States has been to concede the possible existence of Indian rights of occupancy based on immemorial possession within the Mexican Cession as well as elsewhere in this country, does not support petitioners' contentions. That case establishes only that petitioners could have had, as they claim, the right of occupancy to all of the lands involved, even though the greater part of the lands is within the Mexican Cession. The *Santa Fe* case has no bearing upon the question here, namely, whether the Treaty of July 30, 1863, was intended to recognize petitioners' Indian title to the lands described therein. Petitioners argue that the Treaty of July 30, 1863, proceeded in recognition of rather than in opposition to petitioners' claimed right of occupancy, and the Treaty must, therefore, be held as a matter of law to have acknowledged their claimed right of occupancy. In the *Santa Fe* case, also, the Railroad Land Grant proceeded in recognition of and not in opposition to the Walapai Indians' claimed right of occupancy. This Court held only that the Walapai Indians were entitled to prove, if they could, that they had the Indian right of occupancy claimed by them. So here the burden rested upon petitioners to prove that the Treaty of July 30, 1863, acknowledged their Indian right of oc-

cupancy. This issue of fact was fully contested in the Court of Claims and was resolved against petitioners. A favorable finding of fact on this issue was an essential prerequisite to petitioners' recovery. Cf. *Choctaw Nation* v. *United States,* 318 U. S. 423, 432.

There can be no doubt of the authority of the United States to make a treaty with an Indian tribe without conceding the validity and extent of the Indian title the tribe may claim. The Government has done so many times with respect to the tribes of the Far West. Cf. Cohen, *Handbook on Federal Indian Law* (1942), pp. 62–63. On many occasions it has made treaties with several tribes which asserted conflicting or overlapping claims to the same territory. See Royce, *Indian Land Cessions* (1899), pp. 676–888; *The Wichita Indians, et al.* v. *United States,* 89 C. Cls. 378, 420–421. It cannot be said, therefore, that as a matter of law the United States may not enter into a treaty which is wholly neutral with respect to the validity of territorial claims made by the Indians. Territorial descriptions contained in a treaty are not in themselves of controlling significance as to its purpose. All of the relevant factors must be considered. When the issue is, as here, whether a treaty has recognized or acknowledged a claimed tribal right of occupancy, the effect to be given the presence of territorial descriptions in the treaty

depends upon all the circumstances surrounding its adoption. Cf. *Choctaw Nation* v. *United States,* 318 U. S. 423, 432. The boundaries mentioned in the Northwestern Shoshone Treaty were of the country "claimed" by Pokatello (R. 44), and those stated in the Eastern Shoshone Treaty were of the Shoshone country "as defined and described by said nation" (R. 41). These territorial descriptions purported to be nothing more than representations by the Indians as to the extent of their territorial claims. Moreover, the descriptions were given in very general terms, and the Northwestern Shoshone Treaty failed to describe the 6,255,000 acres lying west of the Raft River, which petitioners now contend was also part of the territory owned by them. These territorial descriptions are obviously lacking in the preciseness normally to be found in treaties intended to acknowledge Indian rights of occupancy. The record discloses what we believe and the Court of Claims found, to be the proper explanation for the presence of territorial descriptions in the Shoshone Treaties. As the court below stated (R. 74), "The purpose of obtaining a description of territory from the Indians was, as the [Commissioner of Indian Affairs'] letter of instructions of July 22, 1862, stated, to obtain as much information as possible as to what territory the Indians *claimed,* because the Government had no information in that regard from the Indians themselves,

and very indefinite information otherwise as to the territory which they occupied."

Petitioners stress (Br. 44–47) the amendment made by the Senate in ratifying the Treaty, as follows (R. 57):

> Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.

The Court of Claims properly held, we submit, that: "Without the amendment the treaty did not admit or deny aboriginal occupancy, nor did it acknowledge the right of exclusive use and occupancy as against the United States. The amendment therefore added nothing to the treaty in this respect." (R. 74.) Manifestly, the amendment preserved the right of the United States to deny that the Shoshones had any right or title in lands within the Mexican Cession "other or greater" than what they had under Mexican law, and thus sought to make Mexican law determinative of the Shoshones' claimed right of occupancy.[5] In accordance with obligations assumed under

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[5] Like *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, the Senate amendment involved the problem of whether the United States' historic policy conceded the existence within the Mexican Cession of tribal rights of occu-

the Treaty of Guadalupe Hidalgo, the amendment safeguarded such property rights as the Indians might have under Mexican law. It was not concerned, however, with whether the Shoshones had any right of occupancy as they claimed. Like the treaty itself, the Senate amendment neither recognized nor extinguished petitioners' claimed tribal right of occupancy. It is wholly immaterial, therefore, on the question whether the Treaty of July 30, 1863, gave rise to the right of occupancy upon which the present suit is based.

That petitioners' asserted right of occupancy may not have been extinguished by, and may have survived, the Treaty of July 30, 1863, is equally inconsequential here. If the Treaty did not affirmatively recognize and acknowledge the petitioners' right of occupancy, appropriation by the United States of the lands involved did not give rise to a claim "arising under or growing out of" the Treaty within the meaning of the Jurisdictional Act, but only to a possible claim arising under or growing out of their asserted right of occupancy. Since Congress has not consented to be sued by petitioners on a claim arising out of

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pancy based on immemorial possession. Although this Court held in the *Santa Fe* case that such rights could exist within the Mexican Cession under the laws of the United States, it recognized in its opinion (pp. 345–346 of 314 U. S.) that, as the Senate amendment indicates, the question was highly debatable, at least until the decision in *Cramer* v. *United States*, 261 U. S. 219.

their asserted Indian title, a suit based upon such a claim cannot now be maintained.

Petitioners rely heavily (Br. 37–41) on the Court of Claims' determination that, by the Fort Laramie Treaty of September 17, 1851, the United States acknowledged the title of several Indian tribes to the respective territories described in that treaty. *Fort Berthold Indians* v. *United States,* 71 C. Cls. 308; *Assiniboine Indians* v. *United States,* 77 C. Cls. 347, appeal dismissed and certiorari denied, 292 U. S. 606; *Crow Nation* v. *United States,* 81 C. Cls. 238.[6] The Fort Laramie Treaty and the Treaty here involved, however, are to be distinguished on a factual basis. In the former case, in view of its provisions and all the circumstances leading to and following upon the treaty, the Court of Claims found that the treaty was intended to acknowledge claimed tribal rights of occupancy; in the present case, it could not so find. The Fort Laramie Treaty involved an intention by the parties to put an end to internecine tribal warfare as well as to establish peace and amity between the tribes and the United States and to secure protection for routes of travel, etc. The Treaty Commissioners and the several tribes met in council and after extended deliberations

[6] Compare *United States* v. *Northern Pacific Ry. Co.*, 311 U. S. 317, 347–349, where the court said the Fort Laramie treaty "did not alter the status" of the lands therein described or "create technical reservations as have many other treaties and acts of Congress."

agreed upon the respective boundaries of the lands claimed by the several tribes. The tribes promised not to encroach upon each other's territory, and the United States agreed not only to respect the tribes' assigned territories, but also to protect them in their occupancy thereof. The Treaty Commissioners acted under specific instructions (71 C. Cls. at 312) "*to establish for each tribe some fixed boundaries* within which they should stipulate generally to reside, and each should agree not to intrude within the limits assigned to another tribe without its consent." (Italics added.) In the treaty (4 Kappler 1065) the tribes severally "recognize" and "acknowledge" their respective territories, the boundaries of which were clearly fixed. Had the treaty not established the respective territories of the several tribes, it could hardly have succeeded in its purpose to establish peace and friendship among the Indians and between them and the United States. As the Court of Claims held, "In what other way and for what other consideration could the commissioners have successfully accomplished their designed purpose than a governmental recognition of certain well-described lands as territory belonging to the Indians by right of occupancy" (71 C. Cls. at 331). On the other hand, in the case of the Northwestern Shoshone Treaty there was a complete absence of any purpose on the part of the United States to define and establish the territory subject to the North-

western Shoshones' claimed right of occupancy. The boundaries of the country claimed by them were not complete nor defined with precision. The primary object of the treaty was to obtain peace and friendship with the Indians, and freedom from Indian molestation for routes of travel, by payment of annuities.

Finally, the rules for the construction of Indian treaties and agreements, upon which petitioners rely (Br. 56–60), do not warrant a different construction from that made by the Court of Claims in this case. While Indian treaties are to be construed, so far as possible, in the sense in which the Indians understood them, and in a manner which is compatible with the full obligation of the United States to protect the interests of a dependent people, they "cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation* v. *United States,* 318 U. S. 423, 432. Cf. *Creek Nation* v. *United States,* 318 U. S. 629, 634, 640; *United States* v. *Mille Lac Chippewas,* 229 U. S. 498, 500; *United States* v. *Choctaw and Chickasaw Nations,* 179 U. S. 494, 500. In this case, as the Court of Claims found (Fdgs. 15, 21, R. 55–56, 58), there was no understanding on the part of the parties to the Treaty of July 30, 1863, that the treaty should acknowledge petitioners' claimed right of occupancy. Cf. *Choctaw Nation* v. *United States,* 318 U. S. 423, 432.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims was correct and should be affirmed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

NORMAN M. LITTELL,
Assistant Attorney General.

ROBERT E. MULRONEY,
NORMAN MACDONALD,
Attorneys.

NOVEMBER 1944.

APPENDIX

The Act of February 28, 1929, 45 Stat. 1407, reads as follows:

> CHAP. 377.—An Act Conferring jurisdiction upon the Court of Claims to hear, adjudicate, and render judgment in claims which the northwestern bands of Shoshone Indians may have against the United States.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction be, and hereby is, conferred upon the Court of Claims, notwithstanding lapse of time or statutes of limitations, to hear, adjudicate, and render judgment in any and all claims which the northwestern bands of Shoshone Indians may have against the United States arising under or growing out of the treaty of July 2, 1863 (Eighteenth Statutes, page 685—2 Kappler, 848); treaty of July 30, 1863 (Thirteenth Statutes, page 863—2 Kappler, 850); Act of Congress approved December 15, 1874 (Eighteenth Statutes, page 291), and any subsequent treaty Act of Congress, or Executive order, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.
>
> SEC. 2. That any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five

years from the date of the approval of this Act; and such suit shall make the northwestern bands of Shoshone Indians party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claims under contract with the northwestern bands of Shoshone Indians, approved by the Commissioner of Indian Affairs and the Secretary of the Interior as provided by law. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys for said Indians to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said Indians.

SEC. 3. That in said suit the Court of Claims shall also hear, examine, consider, and adjudicate all claims which the United States may have against the said northwestern bands of Shoshone Indians. Any payment which may have been made by the United States, including gratuities for the benefit of any band or bands of said Indians or for their support and civilization, shall not operate as an estoppel, but may be pleaded as a set-off in said suit.

SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act an appeal may be taken by either party, as in other cases, to the Supreme Court of the United States.

SEC. 5. The Court of Claims shall have full authority by proper process and orders to bring in and make parties to such suit any and all persons deemed by it necessary

or proper to the final determination of the matters in controversy.

SEC. 6. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he or some attorney from the Department of Justice to be designated by him is hereby directed to appear and defend the interests of the United States in such case.

SEC. 7. Upon final determination of such suit or suits the Court of Claims shall have jurisdiction to fix and determine a reasonable fee, not to exceed 10 per centum of the recovery, together with all necessary and proper expenses incurred in preparation and prosecution of the suit, to be paid to the attorney or attorneys employed by said northwestern bands of Shoshone Indians, or any of them, and the same shall be included in the decree and shall be paid out of any sum or sums found to be due said bands.

SEC. 8. The balance of the proceeds of all amounts, if any, recovered for said northwestern bands of Shoshone Indians shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled thereto, and shall draw interest at the rate of 4 per centum per annum from the date of the judgment or decree and shall be subject to appropriation by Congress only for the health, education, and industrial advancement of said Indians.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 115 63

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,

Petitioners,

vs.

THE UNITED STATES.

STATEMENT OF GROVER A. GILES, ATTORNEY GENERAL OF THE STATE OF UTAH, *Amicus Curiae*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

GROVER A. GILES,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 915

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,

Petitioners,

vs.

THE UNITED STATES.

STATEMENT OF GROVER A. GILES, ATTORNEY GENERAL OF THE STATE OF UTAH, *Amicus Curiae*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

On behalf of the State of Utah, in which many members of petitioner bands still reside, the undersigned respectfully suggests to the Court the propriety of granting the writ of certiorari in the above case; and as reasons therefor respectfully states:

When the white settlers first came to Utah to colonize, its northern area was occupied by the petitioner bands. Sovereignty over these lands was obtained by the United States from Mexico under the Treaty of Guadalupe Hidalgo.

By virtue of their immemorial possession they were possessed of Indian title to this land (*United States v. Sante Fe Pacific R. Co.*, 314 U. S. 339) often denominated by the whites as an "Indian claim." The development of the gold mines in northern Idaho and the migration to the Oregon country made it highly desirable from the standpoint of the whites that rights of way and other concessions across petitioners' land be obtained by treaty. Accordingly, on July 30, 1863, the United States entered into a treaty at Box Elder, Utah, with the petitioner Indians (13 Stat. 663), by which petitioners granted certain rights of way, etc., across their lands. The treaty was, of course, written by the treaty commissioners representing the United States; for none of the Indians who signed the same could either read or write. In the language of the frontier, the treaty described the land of petitioners as "the land claimed by Pokatello (a chief of petitioner Indians) for himself and his people." The treaty contained no cession of, or extinguishment of Indian title to, this land.

The petitioner Indians insist that by this "white man's treaty" by which they granted rights of way, etc., to the whites, they had the right to assume and understand that their Indian title was recognized and that they would not be driven from and deprived of their land without further treaty agreement. And although Congress by Act of February 23, 1865 (13 Stat. 432), authorized the President to enter into treaties with the Tribes of Indians in Utah Territory to extinguish their Indian title (R. 38-9), no subsequent treaty was ever made with petitioner Indians. Nevertheless, practically all of their land in Utah has been taken from them by the United States for grants to railroads, school sections,

homesteads for whites, etc. Petitioners have thus been forever deprived of their homeland and have never received one cent by way of compensation therefor. Yet, not until Congress granted them a jurisdictional Act in 1929 (45 Stat. 1407), were they given even a right to sue.

By the decision of the court below, petitioner Indians have been told that the Box Elder treaty of 1865 did not recognize their Indian title and that the United States consequently has to pay nothing for their land. There is serious doubt as to the soundness of that decision. Obviously, petitioners ought to be treated as well as other components of the Shoshone Nation (for decision in the case of the Eastern Band of Shoshones, see *Shoshone Tribe of Indians v. United States*, 299 U. S. 476, 304 U. S. 111), and, as a matter of law, equally with the Indians of other states (Montana, North and South Dakota, Wyoming and Nebraska) as ruled by the Court of Claims in *Fort Berthold Indians v. United States*, 71 C. Cls. 308, and like cases.

Also, the view of the court below that, with respect to land obtained from Mexico, the United States recognized no possessory right of Indians but "regarded itself as the absolute and unqualified owner" of the land, and "under no obligation to treat with the Indians occupying the same for the extinguishment of their title" (R. 71) is at variance with the consistent view of this Court that the Indian "right of occupancy is considered as sacred as the fee simple of the whites" (See *United States v. Santa Fe Pac. R Co.* 314 U. S. 339, 345).

The age-old grievances asserted by these Indians, who

constitute a self-respecting segment of the population of Utah, deserve definitive ruling by the highest court of the land in the interest of fairness to this people.

Respectfully submitted,

GROVER A GILES,
Attorney General of the State of Utah,
Amicus Curiae.

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SUPREME COURT OF THE UNITED STATES

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MEMORANDUM AMICUS CURIAE, OF BERT H. MILLER, ATTORNEY GENERAL OF THE STATE OF IDAHO IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BERT H. MILLER,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES

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Petitioners,

vs.

THE UNITED STATES,

Respondent.

MEMORANDUM AMICUS CURIAE, OF BERT H. MILLER, ATTORNEY GENERAL OF THE STATE OF IDAHO IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Bert H. Miller, Attorney General of the State of Idaho, respectfully files this memorandum, *amicus curiae*, in support of the petition for certiorari to the Court of Claims.

The main body of petitioner Indians reside in Idaho. Since their lands have been taken from them they do not, as bands, have any fixed domicile at the present time. Some have been permitted to take up their abode on the Fort Hall Reservation, which by Executive Order of June 14, 1867 (I Kapp. 837) was set apart for the Boise and Bruneau bands of Shoshones, and by Executive Order of July 30,

1869 (1 Kapp. 839) extended so as to include the Bannock Indians.* Others are scattered in small groups throughout Idaho.

The Eastern Shoshones entered into a treaty with the United States on July 2, 1863 (18 Stat. 685). By this treaty the Eastern Shoshones granted certain rights of way to the United States over their land, etc., and set forth certain lands claimed by the Indians. On July 30, 1863 (13 Stat. 663), the petitioner Indians entered into a similar treaty with the United States which incorporated the provisions of the Eastern Shoshone treaty and also set forth certain land claimed by the Northwestern Shoshones.

On the part of the United States, it was contemplated that additional treaties would be entered into by which these respective divisions of the Shoshone Nation would cede their land to the Government for additional compensation. On July 3, 1886, a subsequent treaty was entered into with the Eastern Shoshones (15 Stat. 673) by which they did surrender the land described in their original treaty in exchange for certain other land in the State of Wyoming. In subsequent litigation between these Indians and the United States over the substituted land they had received in Wyoming, this Court stated that the effect of the original treaty of July 2, 1863 was to set aside a large reservation for the Shoshone Indians (*U. S.* v. *Shoshone Tribe*, 299 U. S. 476, 304 U. S. 111). As respects the petitioner bands (Northwestern Shoshones), no subsequent treaty was ever entered into with them. They never did cede their land to the United States and yet the United States took it from time to time for its own benefit. They have received no compensation therefor.

---

* Whether, should the other Tribes object, the Northwestern Shoshones have a right to remain on such Reservation is not here in question and no opinion thereon is expressed.

Not until February 28, 1929 (45 Stat. 1407) did the United States grant petitioner Indians a right to sue for the taking of these lands. That jurisdictional act was passed with this claim in mind. The Secretary of Interior in reporting on S. 710, 70th Congress, which became the jurisdictional act, said (S. Report No. 519, 70th Cong., 1st Sess.):

> "The records show that the northwestern bands of Shoshone Indians were parties to the treaty of July 30, 1863 (13 Stat. 663), by which they affirmed the treaty of July 2, 1863 (18 Stat. 685), between the United States and the eastern band of Shoshone Indians.
>
> "The northwestern bands of Shoshones are, under the treaties mentioned, asserting claims against the United States for large tracts of land in northern Utah and Nevada, and in southern Oregon and Idaho, and which lands, they allege, were disposed of by the Government without a cession by or consent of these Indians."

The opinion of the Court below apparently holds that, although the United States by treaty agreed to pay petitioner Indians for certain rights of way over their land, this did not constitute any recognition of petitioners' "Indian title" to that land and that the United States could thereafter disturb or appropriate it without accounting to the Indians therefor, and that, in any event, the jurisdictional bill did not permit the assertion of this claim, although it is the claim expressly asserted before the Committees of Congress when the jurisdictional act was passed. Admitting the inability of the Indians to sue without the consent of the sovereign, the jurisdictional act of February 28, 1929 (45 Stat. 1407) would seem to remove that disability and expressly give the Indians the right to sue for the treaty lands taken from them.

Such a result on similar facts was obtained by the court below with respect to the Indians of Montana, Wyoming,

Nebraska and North and South Dakota. (*Fort Berthold Indians* v. *United States*, 71 C. Cls. 308; *Assiniboine Indians* v. *United States*, 77 C. Cls. 347; appealed dismissed and cert. den. 292 U. S. 606, and *Crow Nation* v. *United States*, 81 C. Cls. 238). The Indians of Idaho are entitled to the same treatment.

It is, therefore, respectfully submitted that the Court should grant petitioner Indians the right to be heard on this important question; to deny them a hearing by the highest Court of the land with respect to the taking of their entire tribal domain would not accord with our sense of fair play, nor inculcate in them the proper respect for their newly granted American citizenship (43 Stat. 253, 84 U. S. C. 601).

Respectfully submitted,

BERT H. MILLER,
Attorney General of the State of Idaho,
Amicus Curiae.

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BRIEF AMICI CURIAE

BERT H. MILLER,
Attorney General of the State of Idaho;
GROVER A. GILES,
Attorney General of the State of Utah.

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BRIEF AMICI CURIAE

This brief is filed by the undersigned *amici curiae* in support of the contentions of petitioners that the judgment of the Court of Claims should be reversed. Most of petitioner Indians reside in the States of Idaho and Utah; and this brief is filed by reason of the interest of those states in trying to obtain justice for an indigent and deserving portion of their citizenry.

The claims of petitioners against the United States have existed since before the formal organization of our respective states. The treatment accorded them—that of depriving them of their land, after they had been peaceful and fair enough to grant all rights in that land requested by

respondent and in circumstances which led them to believe that their title would be respected—comprises a chapter in our history of which we are not proud, and for which retribution, so far as it can, should now be made. And notwithstanding that a jurisdictional act was adopted to settle the very claims for taking of the lands which these Indians had so long asserted against the federal government, and was so understood by Congress,[1] the decision of the court below leaves those claims undetermined, on the theory that the claims do not "arise under or grow out of" the Treaty of July 30, 1863.

Having in mind the determination of Congress to put at rest these long-standing claims, the jurisdictional act ought to be read in the sense which would accomplish the intention of Congress. It will be noted that that act refers not merely to the claims "arising under or growing out of" the treaties of the Shoshones, but to claims arising under or growing out of "any subsequent treaty Act of Congress, or Executive order" (App. to Ptr's brf. p. 1).

This last part of the statute is not even quoted in respondent's brief (p. 13). Even, therefore, if respondent were correct in its elaborate argument that the treaty itself constituted no formal recognition of the rights of petitioners in their lands, still it cannot be doubted—as both

[1] The Secretary of Interior in reporting to Congress on the purpose of the bill which became the jurisdictional act in this case said: "The records show that the northwestern bands of Shoshone Indians were parties to the treaty of July 30, 1863 (13 Stat. 663), by which they affirmed the treaty of July 2, 1863 (18 Stat. 685), between the United States and the eastern band of Shoshone Indians.

"The northwestern bands of Shoshone Indians are, *under the treaties mentioned*, asserting claims against the United States for large tracts of land in northern Utah and Nevada, and in southern Oregon and Idaho, and which lands, they allege were disposed of by the Government without a cession by or consent of these Indians." (Italics added.) S. Rep. No. 519, 70th Cong., 1st Sess.

the opinion of the court below (R. 27) and the brief of respondent (p. 3) have recognized—that petitioners at the time of the treaty actually had an Indian title, which, under the familiar decisions of this court were entitled to protection and respect. *United States* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 345, and cases cited therein. As early as *Mitchel* v. *United States*, 9 Pet. 711, 746, this Court considered the Indian "right of occupancy * * * as sacred as the fee-simple of the whites."

Subsequent to the consummation of the Shoshone treaties many of these lands were taken either under statutes providing for grants to railroads,[2] grants of land to the states for schools, etc.,[3] or executive orders establishing forest and other reserves,[4] and reservations for other Indians.[5] The opinion of the court below completely overlooked that, in any event, these takings come within the express language of the jurisdictional act quoted above.

We by no means accept the decision of the court below or the argument of respondent in this Court that petitioners did not obtain from the United States in the Shoshone Treaties a clear recognition of petitioners' title to the lands set out by respondent's commissioner both in the treaties and in the map which he forwarded to Washington and which was before Congress when the treaties were ratified. We see little to be added to petitioners' brief in this

[2] Act of July 2, 1864, 13 Stat. 356; Act of July 27, 1866, 14 Stat. 492.

[3] The respective state enabling acts granted certain numbered sections to Nevada, Idaho and Utah for school and other public purposes: see Act of March 21, 1864, 13 Stat. 30 (Nevada), Act of July 3, 1890, 26 Stat. 216 (Idaho) and Act of July 16, 1894, 28 Stat. 107 (Utah).

[4] See Motion for Call upon Secretary of Interior, Item 3 (R. 95) and Reply of Secretary of Interior, paragraph 3 (R. 99).

[5] See Executive Order of June 14, 1867, establishing the Fort Hall Indian Reservation, 1 Kappler 838.

respect. We urge on petitioners' behalf that, the United States having bound itself by treaty of peace and friendship to proceed only in recognition of the rights of the Shoshone Nation in their national domain, violated that treaty in spirit and letter when it proceeded to take that national domain in utter disregard of the rights of the Indians. The result is that a peaceful and friendly people, lulled into a sense of security by the proffers of the United States of peace and amity, have been reduced from a nation able to wrest their living from their primitive ancestral home to a nondescript, homeless, and poverty-stricken aggregation of bands of Indians, without the means to compete in the modern civilization which had disseised them. Until the treaty with petitioners, petitioners were so strong and formidable that the trouble and expense of taking their lands by war—leaving out of account the dishonor that would have been involved in proceeding against a nation which had given no cause for war—would have far outweighed the expense of settling with them for their lands at whatever the cost in money. But the United States did neither. Congress felt it could not at that time afford to extinguish petitioners' title by purchase. Consequently, for a meager consideration, the petitioners granted respondent certain valuable rights in those lands. For respondent, under these circumstances, to attempt to deny petitioners' title is unworthy of our country.

The faith of this nation having been pledged in the treaties, the honor of the nation demands, and the jurisdictional act requires, that these long-unsettled grievances be settled by this court in simple justice to a downtrodden people. Any judgment obtained, under the language of the jurisdictional act, will be deposited in the Treasury of the United States and be used for their "health, education and

industrial development," which is the only retribution we can now make for wrongs perpetrated upon them.

Respectfully submitted,

BERT A. MILLER,
Attorney General of the
State of Idaho;

GROVER A. GILES,
Attorney General of the
State of Utah.

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No. 63

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,

Petitioners,

v.

THE UNITED STATES

PETITION FOR REHEARING AND BRIEFS IN SUPPORT THEREOF

MANLEY O. HUDSON,
ERNEST L. WILKINSON,
Attorneys for Petitioners.

JOHN W. CRAGUN,
JOSEPH CHEZ,
Of Counsel.

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PETITION FOR REHEARING

Petitioners respectfully ask a rehearing of the above cause, in which the opinions were delivered March 12, 1945. In support of this petition, there is annexed hereto a memorandum prepared by Judge Manley O. Hudson, followed by the brief of other counsel for petitioners.

MEMORANDUM BY MANLEY O. HUDSON

A rehearing is sought in this case on the ground that the Court has misconstrued and misapplied the Box Elder Treaty of July 30, 1863.

The importance of the case is enhanced by the fact that taken together the Court's opinion and the concurring opinion place in jeopardy a great body of American law by which thousands of men and women of original American stock shape the day-to-day ordering of their lives. Doubt has been created, not solely with reference to the integrity

of the Box Elder Treaty, but also with reference to the general policy of the United States with respect to Indian treaties.

The issue in the case has a significance which transcends the actual controversy between the Northwestern Bands of Shoshone Indians and the Government of the United States of America. Far more is involved than the question whether a sum of money is to be set aside in the Treasury of the United States to be used, as the judgment of Congress may dictate, "for the health, education, and industrial advancement" of these needy bands of Shoshone Indians.

What is at stake here is the declared and historic policy of the United States in the treatment of a racial and linguistic minority. And this at a time when the whole world is aflame on the subject of the treatment of minorities.

Simple enough it seems to many Americans to prescribe justice for minorities in distant lands. Time and again our Government has sought by treaty and by diplomatic intervention to assure the protection of minorities in other countries. At this very moment, the United States is engaged in negotiations for creating a world organization designed to "promote respect for human rights and fundamental freedoms".

The Shoshone Indians belong to a minority which lives within our own borders. A denial of their legal rights, or a doubt cast on their statutory privilege of having such rights adjudicated, would tend to undermine our basic international policy before the conscience of the world.

Object of the Suit

The petitioners have not come to this Court to seek the performance by the Government of the United States of what the concurring opinion characterizes as a "moral obligation" ensuing from an ancient wrong. They are not here asking the Government of the United States to do

"what in the conditions of this twentieth century is the decent thing" (P. 15 of opinion) [1] They are not here appealing to the United States for what the Court's opinion refers to as "generosity" (P. 14). If the situation of the petitioners has such aspects, they are entirely outside the scope of this litigation.

The petitioners are before this Court asking solely for the recognition of their legal rights under a treaty solemnly concluded on both sides, which has been incorporated into the law of the United States.

The petitioners have come to the only tribunal which is open to them for asserting these rights. It is a tribunal of the other party to the Treaty, but the petitioners have no other choice. No international tribunal exists to which they may have access.

If, as intimated in the concurring opinion, it is "far-fetched" to "apply the litigation process" (P. 16) for the ascertainment of the petitioners' legal rights, the law of the United States prescribes it, and the petitioners have no recourse other than this litigation process.

It is true that the legal rights which the petitioners seek to have established grow out of a treaty concluded more than eighty years ago.[2] That treaty created a legal situation which the petitioners have inherited. Their succession to the legal rights growing out of that legal situation has not been challenged in these proceedings. Its confirmation by Congress in the Jurisdictional Act of February 28, 1929, 45 Stat. 1407, precludes any such challenge. That Act expressly negatives any "policy to leave in repose" the

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[1] Hereafter references to pages of the opinion of this Court will be merely "P. 1" etc. References to the record will be "R".

[2] In the *Cayuga Indians Case*, an award was given by an American-British Claims Tribunal in 1926 on a claim based on treaties of 1789, 1790 and 1795. Nielsen's Report, p. 307.

situation upon which the petitioners ask the Court to adjudicate.

The Box Elder Treaty has not been abrogated. No specious doctrine of *rebus sic stantibus* can rob it of force and effect. It has not been in any material sense modified. Its validity is expressly reaffirmed by the Jurisdictional Act. It continues to be the source of the petitioners' rights.

The deprivations suffered by the petitioners began, but they were not ended, eighty years ago. And the petitioners are prepared to prove, at a proper and later stage of this proceeding, that the legal situation which the Treaty created has been invaded by the United States in quite recent years.

Nor does any statute of limitations bar the petitioners' assertion of rights under the Treaty. Congress itself has determined, by the Act of February 28, 1929, that no "handicap of time" needs to "be overcome" in this case (P. 16). Until that act was passed, the petitioners had no recourse to the courts.

The Case Is Not Moot

Despite the intimation in the concurring opinion, this case is in no sense moot. It is true that the proceeds of a judgment would not be paid over to the petitioners directly, that they would be deposited in the Treasury of the United States "to the credit of" the petitioners, and that in the Treasury they would be "earmarked" for such appropriation as Congress may make "for the health, education and industrial advancement" of petitioners. With such a deposit, however, a decided advantage would accrue to these petitioners. With funds "earmarked" for their benefit, petitioners would be in a vastly better position than that in which they would be if the Government's own funds had to be provided to meet any appropriations by Congress.

A destitute, poverty-stricken, homeless people petitioners may be. Yet their misfortunes have not broken them com-

pletely. One possession has been left to them. Pride still stirs in their stalwart hearts. They do not wish to live on a dole. If the Box Elder Treaty is properly construed and applied, they will not be under that necessity.

Indian Policy of the United States

The historic policy of the United States in its relations with the earliest Americans may or may not have been the best policy for it to adopt. That is not an issue in this case. The national policy is clear. It has been constant for more than one hundred and fifty years.

Prior to the Act of March 3, 1871, 16 Stat. 566, hundreds of treaties were concluded with the Indians. They pledged the good faith of the United States. The Indians acted in reliance on them. The policy declared in the Act of 1871 to discontinue the exercise of the formal treaty forever in making agreements with Indians, did not affect treaties previously concluded, and many such treaties are in force today as the prized inheritance of thousands of men and women.

In some cases—of which this is one—the courts of the United States have been opened to Indians for the adjudication of claims based on such treaties. The intimation in the concurring opinion that our courts should be closed for this purpose is enough to strike consternation in the hearts of many Indian peoples. Whether it was or was not wise "to leave such an Indian grievance as this to settlement by a lawsuit" (P. 14), the policy of the United States has been long-continuing, and it is expressly declared and established in the Jurisdictional Act of February 28, 1929, 45 Stat. 1407, under which this case is brought. If this is not an adequate manner of dealing with "a sociological problem" (p. 15), that is not an issue in this case.

Legal Nature of Indian Treaties

Every treaty is an instrument of public law. An international treaty is an instrument of public international law. Yet public international law has not been strictly confined to the relations of political entities ranking as States, and agreements made by States with primitive peoples have not infrequently been brought within its orbit. In some cases, international tribunals have construed and applied treaties to which African or Asiatic peoples have been parties.[3]

At an earlier time, our treaties with American Indians partook of the nature of international treaties, and there was a disposition to apply to them public international law. Now for many years, however, they have been looked upon as instruments of *national* public law, a foundation for which is supplied by the exercise of powers conferred by the Constitution; and when the rules of *international* public law are applied, they are applied only by analogy.

As an instrument of public law, of course an Indian treaty is not to be read as a "common-law contract". Nor is it to be deemed, where a transfer of territory is provided for, the equivalent of a "conveyancing" instrument of private law. The technical refinements of the law of contract or the law of real property will find no place, and they are not to be sought, in an instrument of public law. More particularly is this true where one of the parties to the instrument is an Indian tribe.

As it regulates relations between peoples and not between individuals, every treaty may be said to be what the concurring opinion calls "a political document". That description sets no hurdles for the interpreter; but it should impel

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[3] For example, the *Island of Palmas Case* between the United States and the Netherlands, decided by a tribunal of the Permanent Court of Arbitration in 1928. Scott, Hague Court Reports (2d ser.), p. 84.

in him a respect for the distinction between a treaty and a contract, even between treaties and "contracts between white men".

In international public law, a sharp distinction has been drawn since the days of Victoria between a treaty concluded by two States and a treaty made by a State with an untutored people. A similar distinction has been drawn in our national public law.

A treaty between the United States and Indians is not a treaty between equals. One of the parties is the self-appointed guardian of the other. On the one side, the negotiators can write and read their own language; they are familiar with the art of expression; the treaty is drafted by them; and the text is in their language. On the other side, the negotiators do not write and read their own language; they are not skilled in expression; their role is usually limited to accepting or rejecting what is said to them by interpreters who are not of their own selection. Moreover, for the Indians, there may be, in the background of the negotiations, a compulsion which is not born of their own needs.

Yet the Indians did not lack capacity to enter into a treaty. They were capable of understanding the transaction which we call a "bargain". They were accustomed to barter. They had a sense of exchange. They traded with other Indians as well as with white men. They entered into treaties with other Indians, as well as with white men.

Even if it be true, as the concurring opinion states, that the Indians "did not know what titles were" and that they "had no such concept as that of individual land title", their sense of tribal property was well-developed. Studies of the law of the earlier Americans have been all too few, though the law of primitive peoples in some other parts of

the world has been thoroughly explored,[4] and the aid which more adequate investigation might have revealed is lacking. Even if Indian "acquisitiveness" had not developed "a law of real property" comparable to that of the white man, Indians had a sense of what was theirs, and of what was another's, to use and enjoy. A blanket possessed, a territory over which they were habitually free to move and hunt and fish, was theirs and not another's. Habit and custom moulded their wants, and their wants were not those of the squatter. They changed their habitat with the season. They lived and moved as a community. Long before Karl Marx, they had a communistic society. Like New England, they had a conception of the "common"; unlike New England, they built no stockades to serve as their prisons. They declined to be "fenced in", even in their own "country".

These characteristics did not preclude the Indians from claiming land as tribal property, nor prevent their seeking and bargaining for recognition of their claims in treaties with an encroaching outsider.

Interpretation of Indian Treaties

The inequality between the parties imposes a special duty on the interpreter of an Indian treaty. Even a treaty between States, dealing with each other at arm's length, is to be interpreted by a national court liberally. As stated in *Nielsen* v. *Johnson*, 279 U. S. 47, the rule is that "treaties are to be liberally construed", and "when a treaty provision fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred". When a court construes a treaty with an Indian people, the reasons for this rule become even more imperative. It is then necessary

[4] For example, Van Vollenhoven, Miskenningen Van Het Adatrecht, Vier Voordrachten Aande nederlandsch — in — Dische Bestugrsacademie (1926).

"to counterpoise the inequality 'by the superior justice which looks only to the substance of the rights without regard to technical rules.'" *U. S.* v. *Winans*, 198 U. S. 371, 380, 381.

The petitioners contend that, as stated by Mr. Justice M'Lean in *Worcester* v. *Georgia*, 6 Peters 515, 582, "the language used in treaties with the Indians should never be construed to their prejudice", in the sense of disappointing their justified expectations; of course a treaty of cession might "prejudice" Indians in the sense of extinguishing their titles. Petitioners also contend that terms employed in an Indian treaty should always be construed, as was said in *Jones* v. *Meehan*, 175 U. S. 1, 11, "in the sense in which they would naturally be understood by the Indians". It is a consequence that when called upon to interpret an Indian treaty a court must have scrupulous regard for what the Indians, with their mental habits and their unlettered wisdom, would have been justified in taking as the meaning of terms translated to them; that it should refrain from attributing to Indians the refinements of the English language which, though easy for lawyers to appreciate after the event, may or may not have been in the minds even of the white negotiators who framed the language.

No exception is taken to the rule announced by the Court that effect should be given to "what the parties meant by the treaty". Exception is taken, however, to the way in which the Court applied that rule in this case. For the Court has based its conclusion on what may have been the objective of only one of the parties. Yet the rule announced calls for determining what both of the parties meant by the treaty.

The rule requires a careful application. What the parties meant is not to be ascertained by an attempt to discover the mental cogitations which actually took place. It cannot be divined by a psychiatric reconstruction based upon

a series of "fictional assumptions". A *subjective* intention cannot be deciphered. It is an *objective* intention which is to be sought, and the text may require that with the aid of the materials available it should be ascribed to the parties.

Negotiators are not always clear in their ideas. They cannot foresee, and they usually do not atempt to foresee, all possible applications of the text to which they subscribed. The issues which more often arise are those which were never contemplated by the draftsmen of the treaty. To avert a breakdown of the negotiations, a draftsman will often search not for clarity but for a studied lack of clarity, indulging a hope that an assignment of objective meaning by a competent body will enable his ends to be accomplished.

Interpretation is not a process of phonographic reproduction. It requires the judgment and skill of judicial experience. Words do not possess absolute meanings to be transcribed. It is their use at a given time and place, by all the parties, which is to be judged.

Hence the function of a tribunal is not limited to searching for entertained intentions. It must appreciate the situation in which both parties found themselves, it must weigh the evinced desires of both parties, it must determine the extent to which those desires were realized, it must assess the effects of the means adopted to that end, and in this light it must assign a meaning to the text. As one competent writer on international law has put it, the tribunal must seek and build out of the materials available for judicial use the "design" of the parties.[5]

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[5] Charles Cheney Hyde, in 24 American Journal of International Law (1930), p. 1; 27 *idem* (1933), p. 502.

The Text of the Box Elder Treaty

What is the text to be construed in this case? It consists of three parts, and they are of as many origins:

(1) The four "articles of agreement" signed and marked at Box Elder on July 30, 1863.

(2) The six "articles of agreement" signed and marked at Fort Bridger on July 2, 1863, later incorporated into the Box Elder Treaty "as a part" thereof, by Article II of the latter.

(3) An additional article, which is referred to in the Court's opinion as "the Senate's amendment to the treaty". As the text was proposed by the United States Senate, this reference serves for purposes of convenience. Yet of course the Senate's proposal of the text gave it no force or effect. Spurred by the Senate's proposal, the Government of the United States decided to seek the incorporation of the proposed text into the Treaty, and that result was achieved only when on November 18, 1864, both of the parties agreed to that effect (R. 57). As incorporated, the Senate text became an addition to the Treaty. It did not amend the pre-existing text.

These three parts of the Treaty constitute its text, and that text consists of eleven articles. Each part of the Treaty must be read with every other part. Each provision is to be given effect in the light of other provisions. The cardinal rule of interpretation must be applied that the Treaty is to be construed as a whole.

This treaty was one of a series of the five treaties negotiated with Shoshone Indians between July 2 and October 14, 1863. As the United States commissioners acted under the same instructions, as the texts of the five treaties followed the same general pattern, and as the Fort Bridger Treaty

was textually incorporated in the Box Elder Treaty, it may not be improper to interpret each of the five instruments in the light of each of the others. As a part of the history of these treaties, account may also be taken of the fact that the Shoshones were represented at the negotiations which led to the conclusion of the Fort Laramie Treaty of September 17, 1851, and were willing to set their marks to that instrument which has consistently been held to recognize Indian title[6]; their failure to be included among the parties was due only to the fact that they belonged to a superintendency other than that of the chief negotiator on behalf of the United States. Annual Report, Commissioner of Indian Affairs, 1851, pp. 182-184.

Scant materials are available to serve as aids in the interpretation of the Box Elder Treaty, and all of them originate with a single party. The use of such materials is in no sense improper, but they are not to be taken as controlling in the determination of "what the parties meant by the treaty". They could be given such effect only if, instead of a treaty, the Court were interpreting a legislative instrument.

First are the instructions to the Treaty Commissioners of the United States. Instructions to the Indian negotiators, if they existed, are not available. On the Government side, it was "not expected that the treaty will be negotiated with a view to the extinguishment of the Indian title to the lands" (R. 34). It was consistent with this instruction for the Commissioners to conclude a treaty acknowledging the title which they were not to extinguish, and as will be later shown this is what they did. The United States desired a treaty "mainly to secure the safety of travel" (R. 34)

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[6] *Fort Berthold Indians* v. *United States* (1930), 71 C. Cls. 308; *Assiniboine Indian Tribe* v. *United States* (1933), 77 C. Cls. 347, 370-1, appeal dismissed and cert. denied 292 U. S. 606; *Crow Nation* v. *United States* (1935), 81 C. Cls. 238.

along routes in Shoshone territory, and acknowledgment of the Indian title to their lands was a means of accomplishing that end.

Second are the reports made on one side only. On June 20, 1863, Treaty Commissioner Doty expressed the desire "that some arrangement may be made by which they [the Indians] can with satisfaction return to their hunting grounds, and upon terms which shall secure peace hereafter" (R. 39). Acknowledgment of Indian title was directed to this end. On August 30, 1863, within a month of the execution of the Box Elder Treaty, Commissioner Doty wrote to the Commissioner of Indian Affairs requesting a map upon which he might be "enabled to show the boundaries of the Country ceded by the Shoshones" (R. 51); in a letter of September 22, 1863, he explained "the first object" of the Box Elder Treaty, "to effect and secure a peace with Pokatello, as the road to Beaver Head gold mines, and those on Boise River, as well as the northern California and southern Oregon roads, pass through *his country*" (R. 52). The attainment of this object called for, and the treaty effected, a recognition of the Indian title.

In such correspondence, it would be quite understandable if to ingratiate themselves with their superiors the Treaty Commissioners yielded to a temptation to minimize the obligations imposed on the United States, and the value of the correspondence is to be appreciated with the discount which this possibility entails.

Analysis of the Box Elder Treaty

In concluding the Box Elder Treaty, the parties on both sides had a number of objectives. To say that they had a single objective would be to ignore various parts of the text.

The objectives of the parties are not to be confused, however, with what they did in pursuit of their objectives. Even if it may be inferred that the United States would clearly

have stated its objectives, it cannot be inferred that either party would have clearly spelled out the results achieved. Those results are the legal consequences of what was done.

The Treaty concluded effected various results. These may be enumerated without any undue emphasis on any particular objective of the parties.

1) It established (Art. I) friendly relations between the parties, and formalized the state of peace already existing. Despite such provocations as the attack by Colonel Connor at Bear River in January, 1863 (R. 35), and the subsequent outrage at Bannock City (R. 38), the Shoshones had not gone to war (R. 28). Only the later treaties were entitled "treaties of peace". The friendly relations established were not a one-way street. Peace was to be maintained by both sides. The Shoshones would have been justified in regarding the provision as a guarantee of their security. And security meant for them, as it does for the nations at war today, a continued freedom to live on their own lands in their own "country," undeprived as well as unmolested.

2) It provided (Fort Bridger, Art. II) safe passage for the Government of the United States and travelers under its protection on routes "now or hereafter used" "through the Shoshonee country." This in itself was a recognition by the United States of a "Shoshonee country," held by the Shoshones according to their ideas of what were their lands. The Shoshones would have been justified in so understanding the provision.

3) It imposed (Fort Bridger, Art. II) two duties on the Shoshones: a) to seize and deliver up their "bad men committing depredations"; b) to guarantee, i.e., to guard the safety of travelers. Neither of these duties could be performed unless the Shoshones could have land on which to live and operate. The imposition of these duties was therefore

tantamount to a recognition of their lands referred to as "the Shoshone country," and the Shoshones would have been justified in so understanding the provision.

4) It provided (Fort Bridger, Art. II) that the United States might established military agricultural settlements and military posts, ferries, and comfort settlements, "along said routes" through "the Shoshonee country." In granting this permission, the Shoshonees would have been justified in thinking that they were dealing with their own lands "in the Shoshonee country" and that the United States admitted the lands to be theirs to deal with.

5) It provided (Fort Bridger, Art. III) that the telegraph and stage lines established "through a part of the Shoshonee country" should be unmolested and protected. The Shoshones would have been justified in taking this to be a recognition of their "country," and their performance of the duty assumed necessitated their holding lands in that "country."

6) It declared (Fort Bridger, Art. III) that the Shoshones "stipulated" that a railway might be located and operated "through any portion of the country claimed by them." The Shoshones would have been justified in concluding that the United States recognized their claim to such territory.

7) It provided (Fort Bridger, Art. IV) that "it is understood"—this can only mean understood by both parties—"the boundaries of the Shoshonee country, as defined and described by said nation, is as follows." Article IV of the Box Elder provisions, which serves for a part of the Northwestern Shoshones the same purpose as Article IV of the Fort Bridger provisions for other Shoshones, is to be read with the same introduction; thus read, it provides that *it is understood* "the country claimed by Pokatello, for himself and his people, is bounded" as indicated. The office served

by these provisions is obvious on the face of the Treaty. They mark bounds for "the Shoshonee country" to which various provisions relate, and in which rights are granted by and duties are to be performed by the Shoshone Indians. The United States would have been justified in taking the definite boundaries to foreclose the possibility of more extensive claims; the Shoshones would have been justified in thinking that their claims to the territory described were admitted by the United States. If the negotiators on the Government side were disposed to bear down on the word "claimed" as substantially limitative, and to say that the formalization of the claim in the Treaty had no other effect than to impart to them desired information, it seems highly improbable that the negotiators on the Shoshone side could have shared that disposition, even if the translation to them bore such refined distinctions. They would have been justified, and the white men must have been cognizant of the fact, in taking the unopposed and unrefuted formalization of their claim to be a recognition of its validity. A "claim" by the Indians was to them an assumption and an assertion of title—for that matter, neither the United States nor Mexico had a different conception. An admission of their claim was an establishment vis-a-vis the admitting party of the only title which Indians ever knew. If the language of the Box Elder Treaty was less "apt" than that of Article 5 of the Fort Laramie Treaty of 1851, the difference was not discernible to an Indian mind; and even a white man would have difficulty in seeing a difference between land "claimed" by Indians and land "recognized and acknowledged" by various Indian tribes to be theirs respectively, insofar as acknowledgment by the United States is concerned.

8) It provided (Art. IV) that "in consideration of the other stipulations in the preceding articles," the United

States should increase the annuity to the Shoshone nation by five thousand dollars. In Fort Bridger, Article V, the annuities were said to be, in part, compensation for "the rights and privileges hereby conceded," among which were rights of user of lands in "the Shoshonee country."

9) It provided (additional article) that nothing in the Treaty should "be construed or taken to admit any other or greater title or interest *in the lands* embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof." Even if this does not indicate "more than an intention" of the Senate in proposing this addition "to be sure the new treaty did not add to the complexities of the Mexican Cession title situation" (P. 13), the addition, effected not by the Senate but by the Government of the United States and by the Shoshones, is a part of the Treaty to be construed by "what the parties meant." The Indians could have known nothing of such white men's complexities. It seems most improbable that they had ever taken much account of Mexico's cession to the United States. If the provision had any meaning for them, it would naturally have led them to think that the United States was admitting the title or interest which they had previously enjoyed in the lands embraced within the territories described. Even a white man would be likely to exercise his logic to conclude, from an assertion that "other or greater" interest was not admitted, that some interest was admitted. The terms in which this addition was explained to the Shoshones are not known. They would certainly have been justified in seeing in it a recognition by the United States of the title they had previously held, and the Government of the United States cannot be taken to have moved in ignorance of that fact. If the Shoshones had had the benefit of any legal

advice whatever, they would doubtless have been advised to that effect. They did not have legal advice, but they now seek that legal construction.

It seems not inapposite to recall that when the Covenant of the League of Nations was amended, on President Wilson's proposal, to provide (Article 21) that "Nothing in this Covenant should be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace," this was generally interpreted as an admission by other States of the validity of the Monroe Doctrine. Yet the provision is even weaker than that in the additional article of this Treaty.

Taken as a whole, the Box Elder Treaty should therefore be adjudged to have vouchsafed to the Shoshones the enjoyment in their own way of "the Shoshonee country." Almost every one of the eleven articles in the Treaty must be given that effect. "The Shoshone country" was delimited not by metes and bounds but by the natural landmarks which the Shoshones knew and could understand. Within their "country," they had duties to perform, they granted rights which had not previously existed. Expressly, the Treaty denied to them greater rights and interests in the *lands* in their country within the territory formerly Mexican than they had enjoyed prior to the Mexican Cession by Mexican laws; expressly, *a contrario*, it assured to them the rights and interests, "*in the lands* embraced within" their described territories, which they had possessed prior to the Mexican Cession.

In view of its text, and of the justifiable understanding of that text by the Indians, it is a complete travesty for the Court of Claims to say (R. 58) that the Treaty was merely "a treaty of peace and amity with stipulated annuities for the purposes of accomplishing those objects and achieving that end."

This Court's opinion neglects the fact that the Treaty was a bilateral instrument. It ignores what the Indians could have justifiably understood the text to mean. It fails to establish objectively the intention of the two parties.

That the Court has misapplied in this case its own rule of determining "what the parties meant" is evident from its "inference that had either the Indians or the United States understood that the treaties recognized the Indian title to these domains, such purpose would have been clearly and definitely expressed by instruction, by treaty-text, or by the reports of the treaty commissioners, to their superiors, or in the transmission of the treaties to the Senate for ratification" (P. 10). On the Indian side, no instructions, and no reports by the negotiators are available and probably none ever existed; the understanding of the Indians must be deduced from the treaty text, placed in its proper setting. Yet not a line in the majority opinion or in the concurring opinion reveals an attempt to appraise the Indians' objectives or their understanding, or what the United States commissioners must have known to be the view taken by the Indians.

The Court distinguished the provisions in the Box Elder Treaty from those in the Fort Laramie Treaty of September 17, 1851, which have repeatedly been held to have acknowledged Indian titles; yet Article 5 of the latter could have meant, neither to Indians nor to white men, anything different from what was contained in the Box Elder Treaty. Nor is the Fort Laramie Treaty to be distinguished as having set boundaries between various Indian tribes; for the series of five Shoshone Treaties also had that effect. In dealing with the additional article of the Box Elder Treaty, much is said of what might have been in the contemplation of the Senate which drafted it, but nothing is said of the

understanding of the Indians without whose acceptance the addition could not have been effected.

The Court's interpretation and application of the Box Elder Treaty would impose upon petitioners a white-man's interpretation of a white-man's language, without regard for the red-man's conception of the effect of the instrument.

Respectfully submitted,

MANLEY O. HUDSON.

BRIEF OF OTHER COUNSEL

I. *The Court Has Made Unwarranted Assumptions as to the Number of Present Indian Beneficiaries, the Time of the Taking of the Land by the United States, and the Amount of Money Involved.*

There is no evidence in the record as to the present number of the Northwestern Bands of the Shoshones. If there were ultimately a recovery in this case, the Secretary of the Interior would in the usual course compile a roll of the tribe. The Court (p. 16) repeats an estimate made in 1863 of 1500 members (R. 28), but it is obviously misleading to think today in those terms. The record presents no data as to the increase in the numbers of these admittedly peaceful bands.

The Court assumes that the entire area of 15,000,000 acres was taken by the United States around 1863. The Court of Claims made no finding as to the amount of land taken or the time of taking. Under its practice complete evidence on this point is not taken until the Court first determines that the United States is liable. Consequently only sufficient evidence was introduced below to show that some of petitioners' land had been taken. Petitioners admit that the land taken does not embrace the entire area set forth as petitioners' land in the Shoshone treaties, and that such as was taken by the United States has been gradually taken over the years—some of it only recently. There is, therefore, no basis for the assumption that this is an ancient wrong. A considerable amount of the land has been taken from the present generation.

~~In addition, the Court erroneously assumes (pp. 1, 16) that the United States must pay for the entire 15,000,000 acres pleaded.~~ The Court also assumes that the 15,000,000 acres must be paid for by the United States—if recovery is

allowed in this case—at a dollar an acre. But the Court of Claims made no finding as to value, since that was not yet in issue; and it should be noted that in the three cases involving the taking of Indian lands under the Fort Laramie treaty the Court of Claims found a value of only 50-cents an acre. *Fort Berthold Indians* v. *United States*, 71 C. Cls. 308, 340; *Assiniboine Indians* v. *United States*, 77 C. Cls. 347, 376; *Blackfeet Indians* v. *United States*, 81 C. Cls. 101, 136. From the valuation in those cases, gratuities were offset so that in the first case the recovery was only $2,169,168.58, in the second nothing, and in the third $622,465.57. In the present case there has been filed in the Court of Claims a report of the General Accounting Office, claiming offsets of over $4,000,000 from 1863 to 1931, against petitioners (including, however, certain items for other Shoshones as well). It is therefore improper to assume that a judgment for petitioners would entail an enormous money judgment against the United States.

II. *The Concurring Opinion Raises Questions upon Which Petitioners Have Not Been Heard and Repudiates a Century of Legislative, Administrative, and Judicial Practice.*

To say that a favorable judgment would give the Indians "neither their lands nor money", put not a cent "into the reach of the Indians", and amount only to an "earmarking of funds" (pp. 14, 15) misconceives the guardianship exercised by the executive upon authority conferred by Congress. The Indians, while they may not get the identical lands sued for, certainly do receive the money just as any other ward or beneficiary might receive it. The sovereign, as guardian may utilize it to purchase lands, ventures into farming or husbandry, for undertaking crafts, for training, or for other useful purposes. See for example 50 Stat. 872 and 53 Stat. 1252 which followed the judgment of this Court

in *United States* v. *Klamath & Madoc Tribes*, 304 U. S. 119.

Nor is such a judgment merely an "earmarking of funds", but a source of funds without which no moneys would be available to them for such purposes. Payments of judgments in favor of Indians, satisfied by Congressional appropriations, are required by law to be made under the direction of the officers of the Interior Department charged with the supervision of Indian Affairs (25 U. S. C. § 118); and the same officers are similarly authorized to allot to certain Indians their share of tribal funds or pay such share for their benefit (*id.*, 121). The position taken in the concurring opinion comes close to a statement that a beneficiary has no property rights because his trustee will hold the recovery.

Moreover, the purpose of the Jurisdictional Act—in providing that the funds realized should be used "only for the health, education, and industrial advancement of said Indians"—is obviously designed to preclude their use for mere subsistence purposes under the guardianship system. Thus, the Indians not only receive the beneficial interest in any recovery but are assured that the moneys realized will not be used for mere day-to-day purposes, but will enable them to live a more abundant life—something they could not possibly enjoy under subsistence funds doled out by Congress.

To say that Congress could appropriate funds for "the health, education and industrial advancement" of the Indians "without any judgment or earmarking of funds", and to assume that Congress will do so with the same liberality as in the case of funds owned by the Indians, is an altogether unrealistic approach and ignores legislative policy determined by the proper arm of the Government based upon political considerations not presented to the Court. Funds owing Indians by reason of breach of a solemn duty of the United States may be realized for In-

dians through payment of a Court judgment when the practicalities of politics forbid their being made available by direct appropriation from the Treasury. Indian bills are almost invariably considered in Congress only on the consent calendar. We are informed by the Clerk of the Committee on Indian Affairs of the House of Representatives that of 190 such bills in the last Congress, only 18 passed.

Moreover, the Constitution commits to Congress the judgment as to how obligations, moral or legal, are to be met; and it has embodied its judgment in the Jurisdictional Act under which this proceeding is brought. Finally and more important, the Indians desire no legislative handout; for they desire—just as white litigants desire and secure—an orderly, ethical, and judicial determination and righting of wrongs. The Constitution and Congress provide courts for that purpose.

To say that "the generation who suffered" has gone (p. 15) is a half truth. Their descendants, who have not been the beneficiaries of suitable treaty provisions, feel that they still suffer. In them the tribal idea and tribal continuity is strong. As simple people, they have heard endlessly of the wrongs committed by the whites upon their tribe. They sue as a political entity which has never ceased to exist—the tribe. As a tribe, they wish the matter determined. The Court of Claims has been denied to the tribe until now. They do not feel that these are "endless and pointless lawsuits" (p. 18), but that they are the presentation of claims just as justiciable as a thousand other kinds of public and private—domestic and international—claims and causes. Neither are they pointless lawsuits to the executive officers or legislative committees charged with the conduct of Indian Affairs.

It is an indulgence in "unrealistic and fictional assumptions" to say that the problem here is not one of legal obligation, legal right, and legal damages (p. 15). For no other

solution will set at rest the tribal yearning for vindication. There is no more difficulty in determining the obvious effect of this Treaty than there is of a holographic will, a frontier sale of a mining claim, a person's domicile, a constitution, or a treaty with a foreign power executed in 1863. The only difficulty here is the importation of the conveyancer's art into an otherwise simple agreement with an unlettered people. The treaties now about to be entered into with a large part of the world include comparatively primitive people, yet one of the most persistent demands is that means be provided for the judicial determination of matters arising in the future under them. Contrary to the assumption of the concuring justices, Indian treaties are not the invention of the white man, but extend to the pre-Columbian era when tribe treated with tribe as to peace, territory, and rights of passage.

Nor is there any difficulty in determining damages. Certainly it is easier to attach a value to the land of which petitioners were dispossessed than to translate into money the value of a breach of promise, seduction, wrongful death (made actionable in behalf of the personal representative of decedent's estate by Lord Campbell statutes) or the thousands of other things which courts, without complaining, do daily.

This Court, in the absence of a hearing on this issue, has no justification for assuming that the Shoshones had no "property concept". The fact of the matter is that Indian tribes had a "property concept" long predating the arrival of the white man. It was predicated, as is this suit, on tribal ownership. While the individual Indian did not have our precise concept of individual property he did

> "know what title to his tribe means. He has been accustomed to hear the claim made that his tribe owns a section of the country. The invasion by one tribe of the region claimed by another has been the cause of

innumerable wars. The denial of ownership in his tribe he fully understands, and whether that denial comes from a hostile tribe or from one of his own number, it is, in his opinion, a crime to be punished."[1]

The recent research of anthropologists is practically all to the effect that the North American Indian had a very definite property concept.[2]

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[1] *The Public Domain* (G. P. O., 1884), p. 1254, quoting *Annual Report*, Secretary of Interior, 1883.

[2] Melville J. Herskovits, THE ECONOMIC LIFE OF PRIMITIVE PEOPLES (1940); C. XI, The Nature of Primitive Property, pp 271-290; C. XII, Land Tenure; Hunters and Herders, pp. 291-307; C. XIII, Land Tenure; Agricultural Peoples, pp. 308-329. At p. 291, Herskovits states:

> The extent to which non-agricultural and non-herding folk possess property in land has in recent years received more careful study than almost any other phase of primitive land tenure. This is directly attributable to the challenge presented by one of the most widely accepted tenets of the older evolutionary school of social theories, that in earliest times hunters and foodgathers recognized no ownership of the land from which they drew their sustenance, and that not until agriculture developed was the allotment of land regularized in customary law. That agricultural peoples hold in common large portions of their available lands—even land that is worked—was generally overlooked. The growing body of testimony from hunting and herding tribes which contravened the accepted point of view went unnoticed for a considerable period, until cases presumed to be aberrant were given new significance by the results of research carried on among the hunting tribes of northwestern North America. It then became apparent that the earlier hypothesis, if not entirely untenable, needed at least to be revised; and support among anthropologists for the older position has been almost entirely abandoned."

See also PRIMITIVE SOCIETY, Robert H. Lowie (1920), pp. 205 *et seq.*, pp. 210 *et seq.* At p. 205, Lowie states, "Notions of property tinge every phase of social life". See particularly Ralph Linton in La Farge, "The Changing Indian" (1942), pp. 42-54. See generally for rights in real property of the primitive Americans, ANTHROPOLOGICAL RECORDS (Univ. of Cal. Press) as follows: Drucker XVII; Gifford, XII; Stewart XVIII; also, W. W. Hill, notes on Pima Land Law and Tenure, AMER. ANTHROPOLOGIST (1936), vol. 38, pp. 586-589; John M. Cooper, Land Tenure Among the Indians of Eastern and Northern North America, PENNSYLVANIA ARCHAEOLOGIST (July, 1938), vol. 8, p. 55; Schmidt, DAS EIGENTUM IN DEN URKULTUREN (Munster in Westfalen, 1937).

Indeed modern anthropological research has established that the Shoshones themselves, in common with other tribes, had a very definite concept of tribal land.[3] If granted a rehearing we can establish this from public documents. In the view of this intelligence, of which the court lacked knowledge, we submit that it is not the Shoshones but this Court and the court below which now attempt to force the problem into "terms of common-law contract and conveyancing" (p. 17).

Consequently before this Court casts doubt upon the whole process of adjudicating Indian claims, and assumes that Indians had no property concept, it should permit the problem to be thoroughly briefed and argued on reheaing—particularly since the issues raised by the concurring judges were not raised by respondent and therefore not briefed by petitioners. This is the least that can be done by this court for these native Americans.

III. *The Majority Opinion (even the Footnotes) Ignores the More Critical Portions of the Treaty as Expressly Adopted by Reference; and the Decision Is Contrary to the History (Including Newly-discovered Public Documents), Terms, and Tenor of the Treaty.*

The Court assumes that, by the Treaty, "the Indians agreed not to molest travelers, stagecoaches, telegraph lines or projected railroads" (p. 5) and nothing more. Although the Court states that the decisive question is whether it was intended "to recognize or acknowledge by implication the Indian title to the lands" (p. 4), the crucial acknowledgment in Article V of the Ft. Bridger Treaty (R. 41) which was incorporated by reference in the Box Elder Treaty (Art. II, R. 43) is not even set out in the footnotes. Even

[3] Tribal Distribution in Eastern Oregon and Adjacent Regions, Verne F. Ray and Others (July-Sept. 1938), Vol. 40, American Anthropologist.

more important, the "understanding" expressed by the United States in the Ft. Bridger Treaty as to boundaries (Art. IV, R. 41) is not even discussed.

The full Treaty—that is, the Box Elder Treaty plus the incorporated Ft. Bridger Treaty—is shown by the following tabulation of covenants:

1. Reestablish "Friendly and amicable relations" and "a firm and perpetual peace" (Art. I, R. 43; Art. I, R. 40).

2. "Routes of travel through the Shoshonee country" to be "forever free and safe * * * without molestation or injury" by Shoshones; safety of travelers guaranteed; predatory Indians to be seized and delivered to U. S. officers; "military agricultural settlements and military posts may be established * * * along said routes; ferries may be maintained * * * and houses erected and settlements formed * * * as * * * necessary for the comfort and convenience of travelers" (Art. II, R. 40). Same as to telegraph, stages, and a railway (Art. III, R. 40-41).

3. "It is understood the boundaries of the Shoshonee country, as defined and described by said nation, is, as set forth (Art. IV, R. 41; Art. IV, R. 44).

4. The United States is "aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by the whites, and by the formation of agricultural and mining settlements" and the United States "are willing to fairly compensate them [the Indians] for the same" (Art. V, R. 41).

5. Shoshones acknowledge that the receipt of annuities is full compensation for the loss of game "and the rights and privileges hereby conceded" (Arts. V and VI, R. 41, 42; Art. III, R. 43-44).

6. The United States recognized no "other or greater interest in the lands * * * in said tribes" than Mexican law recognized in territories ceded by Mexico.

This is the full Treaty agreed to at Box Elder, as distinguished from the brief instrument of adoption set forth

at pages 6-7 of the opinion. The acknowledgment of petitioners, which the Court overlooks, that they were receiving the annuities not, as the Court assumes, as the price of peace, but as consideration for (1) the loss of game, (2) the "rights and privileges * * * conceded," meaning the rights of transit etc. above set forth, must have conveyed to the Indians the impression that their title was being recognized. Even in a white man's civilization one does not receive money for rights of transit over land unless his title is thereby recognized.

The Court, however, lays stress upon the fact that a purpose to recognize Indian title was not "clearly and definitely expressed by instruction" to the treaty commissioners (p. 10) and distinguishes the instructions given with reference to the Ft. Laramie Treaty (p. 11) on the ground that the treaty commissioners there were told "to establish for each tribe some fixed boundaries." That Treaty involved the tribes just east of the Shoshones. The Shoshones pursuant to a conference held the year previous between the Commissioner of Indian Affairs and Indian Agent Holeman were represented by 60 of their head-men, because

> "It was greatly desired to have them there, as the main route for emigration passed through their country."

They were not, however, included in the Treaty as finally drawn *only* because the superintendent in charge of the negotiations believed "that they are not properly in his superintendency, but that they belong to the superintendency of Utah" (Annual Report, Commissioner of Indian Affairs, 1851, pp. 182-184; Appendix to Pet. Br., pp. 9-10).

Since this case was decided, there has come to light another treaty negotiated with the Shoshones in 1855 by the Indian Agent for Utah (Bancroft, *History of Utah*, 1890, p. 477). By this negotiated treaty the Shoshones guaran-

teed the people of the United States safety in traveling "through our country," gave "the right of way through our country" to "pass and repass," acknowledged the applicability of the laws of the United States with reference to "crimes within the limits of our country," and agreed to surrender any "who may have committed crimes within the limits of our country." The negotiated treaty was not ratified, presumably because the agent had not been authorized to negotiate it.

It is thus clear that the Northwestern Shoshones, having taken part in the Ft. Laramie negotiations designed to establish "fixed boundaries" and lay off "geographical * * * domains", and having negotiated the unratified treaty of 1855 replete with statements respecting "their country", must have had the same purpose in view at the following Box Elder negotiations. Neither whites nor Indians are likely to perceive a distinction warranting the contrary result in the two cases. Geographical domains were laid off in the Shoshone treaties between the five divisions of the Shoshone Nation in the same way as between the different tribal signatories in the Fort Laramie treaty.

The maintenance of "friendly and amicable relations" could be achieved only by making such territorial arrangements. The commissioners were instructed not to extinguish Indian title (pp. 5, 9), which means what it says—that the Shoshones were to retain title. Their boundaries were to be established "within which they will confine themselves" (R. 34). Without the niceties of conveyancing, that expressed the gist of Indian land policy as vigorously initiated by Andrew Jackson long before:

> "Circumscribe their bounds * * * place [their] landmarks at a permanent point * * *. You give content at home, and peace on your frontier * * * The peace and happiness of the Indians require that this should be done * * * (Letter to President

Monroe, 1817, *Correspondence of Andrew Jackson*, II, pp. 280-281.)"

That was the mainfest purpose of the Shoshone treaties. The immense region over which the Shoshones wandered, from Oregon to the Dakota territory, was reduced to a defined and confined area.[4] Only a month after the negotiation of the Box Elder Treaty, Commissioner Doty requested maps upon which he might "be enabled to show the boundaries of the Country ceded by the Shoshones" (R. 51). The very fact that lands outside the boundaries indicated by Doty were "ceded" to the United States is a recognition of title for without such the Indians had nothing to cede.

That the territory reserved to the Indians may appear large by present standards is not significant, because it is located in what was then known as the Great American Desert and the Shoshone lands had been reported to the Commissioner of Indian Affairs as "too high in elevation ever to be useful for cultivation of any sort" (Annual Report, Commissioner of Indian Affairs, 1849, pp. 66-68; Appendix to Pet. Br. p. 6). "Free and safe" passage was what the United States wanted and got (Arts. II and III, R. 40-41).

In return for what it got, the United States both recognized that it must pay compensation and that the Shoshones had certain territory. The territory was defined not by one treaty but by the five Shoshone treaties (Pet. Br. pp. 12-13). The Box Elder Treaty, here involved,

[4] The majority opinion here recognizes that the definition of boundaries is something more than mere statement of claim, by stating

"It is quite understandable from the point of view of both petitioners and Congress that the Government should limit its submission to suits to claims under the boundaries if acknowledged by the treaty rather than to consent to judicial examination of claims for taking the unknown area of their possible Indian title." (p. 3).)

supplied only two of the interior lines (Art. IV, R. 44) subdividing the total Shoshone area defined by the other treaties (see map R. 55). The exterior lines were supplied by the Ft. Bridger (Art. IV, R. 41), Ruby Valley (Art. V, R. 46), and Tuilla Valley (Art. V, R. 48) treaties. Each of these, including the Ft. Bridger Treaty which the Box Elder Treaty incorporated by reference (Art. II, R. 43), states that "it is understood" that the boundaries were as given therein.

In addition, each of the treaties contains a concession by a Division of the Shoshone Nation that the boundaries so specified are "defined and described by them", obviously to remove any possible future suggestion that they had not assented to the definition. "It is understood" means that both the United States and the Indians understood. "Understood" means that there was mutuality and a meeting of minds. The United States intended that the territory so defined should be the home of the Indians; for the very purpose of the Treaty was—as the instructions state—to establish boundaries "within which they will confine themselves" (R. 34). Apart also from the terms of the instrument it must be apparent that the very character of the transaction amounted to recognition of Indian title. Why enter into a treaty with them except upon the hypothesis that they had title? This result should follow even if there had been no assertion of title in the treaty. The view of the Court in parts of its opinion is that Indian title must be "formally acknowledged" (pp. 2-3) or "clearly and definitely expressed" in the treaty documents (p. 10). (The Court's statement at page 4 that the decisive recognition may be supplied "by implication" is not followed in the other portions of the opinion.) Thereby—although it is conceded that the rule of construction respecting Indian treaties is "that the language should be construed in accordance with the tenor of the treaty" (p. 14)—the Court now treats the

essential question as one of conveyancing. The Court below seemed to think it sufficient that "the treaty commissioners on behalf of the United States" did not intend or agree to acknowledge Indian title (R. 55-56). Either position departs from the recognized rule with reference to Indian treaties.

This Court for more than a hundred years, and in recent years, has recognized that the rule of construction for Indian treaties is as follows:

> "How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." (*Worcester* v. *Georgia*, 6 Pet. 515, 582.)
>
> "The treaty must * * * be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." (*Jones* v. *Meehan*, 175 U. S. 1, 11.)
>
> "Treaties made with [Indians] are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them." (*United States* v. *Shoshone Tribe*, 304 U. S. 111, 116.)
>
> "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." (*Tulee* v. *Washington*, 315 U. S. 681, 684-685.)

This is the rule which this Court has heretofore consistently applied to Indian treaties. It has been applied in this case by neither this Court nor the court below; for it is not to be supposed that the Shoshones could have understood that the United States was merely making a truce with them until—freed from the demands of the then raging civil war—it could dispossess them with immunity.

Nor is it a reasonable assumption that even so primitive a people would, if they so understood, assent to any such proposition.

The opinion of this Court resolves every doubt in favor of the United States. The Court thus states that whether "the issue as to acknowledgment by a treaty of Indian title to land, is treated as a question of fact, * * * or as a matter of inference to be drawn by the trier of fact from the treaty and surrounding circumstances or as a conclusion of law to be reviewed by this Court upon the record, this finding place the burden on petitioners to overthrow the judgment of the Court of Claims" (p. 8-9). If, as this Court has consistently held, the interpretation of a treaty is a question of law (*Jones* v. *Meehan*, 175 U. S. 1, 32 and cases cited; *Utah & N. R. Co.* v. *Fisher*, 116 U. S. 28, 32-3), then the only burden on plaintiff is the burden of going forward with the case; the interpretation of the treaty must be made by this Court without imposing a penalty or burden on either side, and in making such interpretation it had always been understood until now, that any doubts were to be construed in favor of the illiterate and dependent Indians.

IV. *The Result Reached by the Decision Convicts the United States of Sharp Practice With Its Wards and of Paying Tribute for the Protection of Its Citizens.*

It is callous cynicism to assume that the United States entered a solemn treaty with the Shoshone Indians for the sole purpose and with the single effect of buying peace. That was the view of the court below (R. 56), which this Court paraphrases as a finding that "the United States * * * sought only freedom from hostile acts from roving bands by the commitments for supplies. The treaties were made in the midst of civil war and before the outcome of that conflict was clear" (p. 10). Such a view assumes that instead of entering into the treaty for the legitimate pur-

pose of obtaining concessions from the rightful American owners of the soil, that we were so helpless that we had to pay tribute to an Indian tribe for the protection of our citizens—a throwback to the disgraceful episode in our history when near the end of the eighteenth century we along with the leading European nations paid tribute to the Barbary pirates.[5]

There is not one thing in the history of the Shoshone tribe or the circumstances surrounding the Box Elder Treaty that even suggests that the consideration to be paid under the treaty was a price or bribe for peace. Unlike the Barbary Pirates who made repeated demands on us for ransom, the Shoshones were a peaceful nation and had never waged war against us (R. 28). On the other hand the history of the few months preceding the treaty shows that General O'Connor could easily exterminate the entire Shoshone Nation, if it were necessary to protect our citi-

[5] DICTIONARY OF AMERICAN HISTORY, Vol. 5, pp. 324, 325 (published by Scribners in 1940; James Truslow Adams, Editor-in Chief).

It was this episode which at a dinner given to John Marshall upon his return from France in 1798 brought forth the toast, "Millions for defense but not a cent for tribute". The Home BOOK OF QUOTATIONS, Burton E. Stevenson, New York, 1944, p. 63.

The payment of this disgraceful tribute, which the United States led all other nations in abolishing (Larned, HISTORY FOR READY REFERENCE AND RESEARCH, published by the Nichols Publishing Co., Springfield, Mass., 1922) was opposed by Washington from the beginning. In a letter to Lafayette, dated March 25, 1787, he said:

"• • • Chastisement would be more honorable, and much to be preferred to the purchased friendship of the barbarians. By many • • • it has ever been considered as reflecting the highest disgrace on them (European nations) to become tributary to such banditti, who might for half the sum that is paid them be exterminated from the earth." WRITINGS OF WASHINGTON, edition published by the George Washington Bicentennial Commission, G. P. O., 1938, Vol. 29, p. 185.

Jefferson in a letter, dated May 13, 1791, to Thomas Barclay, United States Representative to Morocco, instructed him that we would "prefer war in all cases, to tribute under any form and to any people whatever". JEFFERSON'S WORKS, Definitive Edition, published in 1905 by the Jefferson Memorial Association, Vol. 8, p. 200.

zens (R. 35). In view of these facts we respectfully urge that the Court withdraw its opinion ascribing unto the Administration of Abraham Lincoln the sinister purpose of paying tribute to an Indian tribe for the protection of our citizens. Counsel have been unable in their research to find one other example in the history of this Court where this Court so construed a treaty as to convict this Nation of paying such a tribute.

The contrary interpretation is not only more generous to our Civil War President and our history as a nation but squares with the facts.

The declaration of "friendly and amicable relations" and "a firm and perpetual peace" is merely the preamble (Art. I, R. 43; Art. I, R. 40). The United States took an easement for safe routes of travel and lines of communication (Art. II, R. 40; Art. III, R. 40-41), declared that it "understood the boundaries of the Shoshone country" (Art. IV, R. 41; Art. IV, R. 44), committed itself to compensate them for the harm done (Art. V, R. 41), and granted annuities not for the purchase of peace, but for the recited consideration of "loss of game" "and the rights and privileges * * * conceded" by the Indians (Arts. V and VI, R. 41, 42; Art. III, R. 43-44).

To assume that the United States did nothing more than attempt to use the treaty form to secure a crude declaration of peace on the frontier is to ignore the whole policy of Indian settlement upon land, deprecate the solemnity of treaties, and deny the responsibilities of the guardianship the Nation had assumed. In view of all that had gone before the execution of this Treaty as well as its express terms and objects, so empty a treaty evidences trickery upon a helpless, dependent, and friendly people rather than brotherhood, neighborliness, or responsible decency, a construction in which this Court should never indulge.

Addendum to Brief

Since the preceding briefs were sent to the printer, the opinion of the Court of Claims in *Alcea Band of Tillamooks, et al.* v. *United States*, decided April 2,, 1945 has become available. In that case the Court of Claims, contrary to the dictum in the present case that "extinguishment of Indian title by" the United States "has proceeded, as a political matter, without any admitted legal responsibility in the sovereign to compensate the Indian for his loss", actually holds the United States liable for the taking of bare Indian title. Furthermore, the Court goes on to say:

> "If, in a suit by Indians against the United States pursuant to a special jurisdictional act, evidence of direct recognition by the United States that the Indians had property rights or a beneficial ownership in lands based on original Indian title through exclusive possession and occupancy of such lands were necessary, it would be sufficient in the case at bar to point to the act of August 14, 1848, 9 Stat. 323, which made all land laws of the United States applicable to the Territory of Oregon thereby created and in section 1 stated that nothing therein contained 'shall be construed to impair the rights of person or property pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, * * *" Further, in an opinion on the question of original Indian title to lands and the right of settlement thereon as public lands, the Attorney General on June 5, 1855 (7 Op. Atty. Gen. 293, 299), stated and held that 'There is one other idea suggested by the Commissioner of Indian Affairs, and the documents he communicates, as being current in Oregon, namely, that any white settler may rightfully take possession of any of the lands occupied by the Indians, and oust them prior to the extinguishment of their occupancy-title by the United States. This idea is too absurd to admit of reasoned reply. Suffice it to say that a White settler

has the same right thus to oust the Indians as he has to oust white men, and no more; that is, the right to substitute robbery for purchase, and in violence for law.' "

The reservation added by the Senate as Article V of the Box Elder Treaty in the case at bar establishes greater rights in the Indians—since it is by direct agreement with them—than does the implication from the reservation in the statute above quoted in the *Alcea* case that nothing contained therein was to "be construed to impair the rights of person or property pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians." In the *Alcea* case the statute was addressed only to white citizens, but implied that the United States recognizes and accords to the Indians their ancestral rights. *A fortiori*, when the United States by direct undertaking in a treaty with the Indians themselves provides that their rights shall be no greater than they had been at an earlier time, the United States must be held to have acknowledged the title to as much as they possessed at the earlier time. If the decision in the *Alcea* case be correct—as we think it is—the judgment of the Court in the present case is wrong.

Conclusion

Justice to the Indian tribes, the administration of Indian affairs, and the maintenance of a sound legislative policy respecting tribal claims all require that an opinion so sweeping as the instant one be thoroughly briefed and argued upon all points relied upon by the Court for its judgment. That presentation can only be secured upon rehearing, since the concurring opinion raises issues upon which the parties have not been heard and the principal opinion—in reversing the time-honored rule of construction of Indian treaties—should be reconsidered for the reasons stated herein. The majority of the Court holds, in effect, that in negotiating the Treaty in 1863 the Indians should have anticipated the legal niceties of this lawsuit, which assumes a rule of construction so at variance with the past as to require reconsideration.

Respectfully submitted,

ERNEST L. WILKINSON,
Attorney for Petitioners.

JOHN W. CRAGUN,
JOSEPH CHEZ,
Of Counsel.

Certificate

The foregoing petition for rehearing is filed in good faith for the reasons therein set forth, and not for the purpose of delay.

ERNEST L. WILKINSON,
Attorney for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 63.

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,
Petitioners,

v.

THE UNITED STATES.

Memorandum Amici Curiae of Grover A. Giles, Attorney General of the State of Utah, and Frank Langley, Attorney General of the State of Idaho,

IN SUPPORT OF THE PETITION FOR REHEARING.

GROVER A. GILES,
Attorney General of the State of Utah;

FRANK LANGLEY,
Attorney General of the State of Idaho,
Amici Curiae.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN SUPPORT OF THE PETITION FOR REHEARING.

The undersigned *amici curiae* respectfully urge the Court to rehear the above-captioned case. The decision or decisions[1] in this case will not set at rest or repose the grievances which the Northwestern Shoshones have asserted against the government for so long a time.

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[1] The *amici* have some doubt whether there is any opinion in this case which will stand as the opinion of a quorum of the Court—which appears to be divided 3-2-1-3. In such circumstances, it is not to be expected that the bands of Indians concerned will be able to tell what the view of a majority of the Court actually is.

The *amici* despair of being able to explain to petitioner Indians that they are without redress for the taking of their country because nothing in the records of the United States shows that the United States intended to recognize their title. The petitioner tribes have always pointed to their treaty as establishing rights the violations of which they have so long protested. And until the present opinion, we had thought the law established that it was the understanding of the Indians in the making of the treaty which prevailed,[2] rather than what the representatives of the United States might have reported or have failed to report as to the intention of the United States. Specifically, how are these bands of Indians—as of the time of the Treaty of July 30, 1863, or at the present time—to understand that when they grant the United States a limited permission to use their country, the United States (in its own courts) is not merely guiltless but guileless when it takes not only what it bargained for but the entire use and benefit of their country? How are the bands to understand that when they had their claim to their ancestral country set to paper by the representative of the United States, and delineated with natural landmarks, nevertheless because they did not insist, in accordance with what this Court holds to be the white man's law, that the United States agreed never to take their land from under them they have no substantive rights on their part as against the United States? How can we explain to these bands that when the white man even returned to ask a modification of the treaty so that it would concede in the bands *no more* than they had had some fifteen years earlier, it should now be held to have conceded *no part* of what they had then or at any time held? How can the bands—who in common with other Indian peoples of our country have relied on this Court of all courts for an assessment of their rights in accordance with what they understood their treaty to provide—be expected to be convinced of the white man's

[2] The cases are noted by the Court in footnote 16.

justice when their understanding, heretofore furnishing the rule, is now held to mean only what the "tenor of the treaty" as written and interpreted by the white man may indicate?

We do not pass the statement of the concurring opinion that the finding that the treaty creates no legal obligations does not restrict Congress from such appropriations as its judgment dictates "for the health, education, and industrial advancement of said Indians". The fact is that Congress has done precious little for these wards. They are the object of charity; they have (except for those at the Fort Hall Reservation in Idaho) no Indian agent to communicate their needs; they have no program of government assistance in education or industry; they are scattered throughout the States we represent, truly men without a country of their own. Up to the time of the present decision, these bands have had the conviction that their plight was a legal wrong; that with the proceeds of the reparations which the United States would make them for having violated its covenant of friendship, they would be enabled to establish a tribal program—as have other tribes securing such recoveries—for their health, education and industrial advancement. We feel that in all these respects the Indians are right, and that this Court has, without proper warrant, reversed our fundamental law as to the legal rights of these minorities. The least that this Court can do is to grant a full rehearing.

Respectfully submitted,

GROVER A. GILES,
Attorney General of the State of Utah;

FRANK LANGLEY,
Attorney General of the State of Idaho.
Amici Curiae.

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Supreme Court of the United States

OCTOBER TERM, 1944

No. 63

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,

Petitioners,

v.

THE UNITED STATES

BRIEF OF AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITION FOR REHEARING

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,
ARTHUR GARFIELD HAYS,
Counsel.

RICHARD H. HANNA,
Of the New Mexico Bar;
OSMOND K. FRAENKEL,
ALFRED S. JULIEN,
Of the New York Bar,
Of Counsel.

Supreme Court of the United States

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PETITION FOR REHEARING

Brief Submitted in Behalf of American Civil Liberties Union, Amicus Curiae

I

The American Civil Liberties Union files this brief, *amicus curiae,* in support of the petition for rehearing in this case because it is our view that the broad principles enunciated in the opinions of the Court herein will, if the decision be permitted to stand, materially reduce present juridical rights of the American Indian.

We are, moreover, frankly alarmed at the considerations which apparently induced the Justices joining in the concurring opinion to rule with the majority. In the concurring opinion, Justices Jackson and Black express the view that it is of little consequence whether the Indians prevail in this suit and thereby establish a fund in the Treasury to

their credit, for Congress may, nevertheless, make grants to the Indians for their "health, education, and industrial advancement". This statement of policy, in our opinion, if left unchallenged, would run contra to the modern concepts which have been employed up to now by the Government and our Courts in establishing the Indian's proper status in the community. The concurring opinion overlooks the essential difference between self-help and mendicancy.

In recent years, those concerned with Indian affairs have devoted themselves to the restoration of the self-respect of the American Indian and the encouragement of his assuming an independent status in the community. Too long has the Indian been treated as a beggar on Government relief. His feeling of inferiority has been fostered by the separation from his neighbors in the community who did not similarly enjoy grants and doles afforded the Indian.

The presence of a substantial fund available in the National Treasury upon which the Indian tribe may draw as a matter of right, however, is a wholly different affair. The respect of his neighbors and the self-respect of the Indian himself are promoted thereby.

We do not urge the above as grounds for a grant to the Shoshone Indians, to which they are otherwise not entitled; we make this point to substantiate the contention that the outcome of this case is far more important than the concurring opinion indicated. It *is* material to the Indian and to the community whether he receives funds for "health, education and industrial advancement" as of dignified right or by way of patronizing allowance.

II

The strict construction of the Box Elder Treaty employed in the prevailing opinion to the detriment of the Indians marks an abrupt reversal of tenets of construction heretofore used in reaching the intent and purpose of Indian

treaties. It is unfortunate that this Court should have been divided in a case so far-reaching.

That the meaning of the treaty is ambiguous is demonstrated by the cleavage within the Court itself. It is axiomatic that ambiguities and doubts contained in these treaties are necessarily to be resolved in favor of the Indians. *Winters* v. *United States*, 207 U. S. 564; *United States* v. *Shoshone Tribe*, 304 U. S. 111. Without expressly rejecting this rule of construction, the prevailing opinion, by its rigid interpretation of the treaty, has arrived at a contrary result.

We think that the Court should have employed the customary rule of construction in interpreting the Box Elder Treaty rather than attempting to define the intent of the parties from its uncertain language. Since the Justices of this Court are at odds with respect to the meaning of the document, it is clear that we reach the realm of speculation when we probe for the intent of the aborigines who were one of the "high" contracting parties thereto. In so doing, the majority and concurring opinions have effectively avoided the very purpose of the usual rule of construction.

The American Indian believes that when the United States obtained valuable cessions by treaty, it was acknowledging the Indians' claim to the land. Otherwise, this treaty, and many like it, would have been vain and meaningless compacts. Surely, our Government would not solicit limited grants with respect to property from those lacking power to make them. This is a weighty consideration in favor of finding that it was the intent of the Indians in this treaty that their land rights be recognized.

III

The case *sub judice* is vital to all Indians. The technicalities of this case have sizably cut down the Indian's legal rights under this and similar treaties. The Indians' respect

for our institutions and our Government will not be promoted by the knowledge that their cause has been lost for want of expert Anglo-Saxon scrivening when these treaties were negotiated.

Moreover, not only this minority but our entire democracy suffers by the restriction of the rights of any group on dubious technical grounds. Only recently were the rights of another minority adjudicated adversely on exceptionally technical bases. *Korematsu* v. *United States*, — U. S. —, decided Dec. 18, 1944.

Where minorities suffer, the community at large is the loser.

We do not think that profit can inure to anyone by leaving the "health, education and industrial advancement" of the Indian to the charity of the Congress when substantial justice can produce for the petitioners a fund rightfully theirs for such purposes. To the courts, no less than to the legislative branch of our Government, have been delegated the power and the duty to protect helpless minorities.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,
ARTHUR GARFIELD HAYS,
Counsel.

RICHARD H. HANNA,
Of the New Mexico Bar;
OSMOND K. FRAENKEL,
ALFRED S. JULIEN,
Of the New York Bar,
Of Counsel.

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IN THE

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OCTOBER TERM, 1944.

No. 63.

THE NORTHWESTERN BANDS OF THE SHOSHONE INDIANS,
Petitioners,

v.

THE UNITED STATES.

BRIEF AS AMICUS CURIAE BY THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF THE PETITION FOR REHEARING.

HUSTON THOMPSON,
General Counsel for The National Congress of American Indians.

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BRIEF AS AMICUS CURIAE BY THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF THE PETITION FOR REHEARING.

STATEMENT.

The National Congress of American Indians (hereinafter called the Indian Congress) asks that this brief be considered by the Court in connection with the Petition for Rehearing in the above entitled cause.

The Indian Congress is an unincorporated association consisting entirely of American Indians and already numbering more than 50 tribes located in at least 21 different states, with the number constantly increasing and soon expected to include all Indian tribes. The various tribes of

the American Indians, having struggled for the last eighty years to obtain recognition and justice for their rights, and their claims against the Government, and having signally failed to do so, though not because of the lack of splendid support by their friends, have at last been driven to associate themselves in a group movement. To this end the several tribes held its first convention at Denver, Colorado, November 15, 1944, at which over one hundred thousand Indians were represented.

One of the main reasons that forced the creation of this organization has been the desire for reimbursement for lands which member tribes possessed and owned and of which they were dispossessed by the United States.

One of the members of the Indian Congress is the petitioner in this case. Its representatives were present at the Denver meeting. The Executive Council of the Congress in January, 1945, requested its legislative committee to assist the petitioner in its legal procedure before the United States Government, and, the consent of both parties to the above entitled cause having been first obtained, the Indian Congress respectfully submits the following reasons to the Court for granting a rehearing.

REASONS FOR A REHEARING.

1. The Indian Congress supports and adopts as its own the points and authorities in the brief of the petitioners herein.

2. The Indian Congress respectfully submits that the Court of Claims and the majority opinion in this Court has taken too restricted a view of the Special Jurisdictional Act of February 28, 1929, 45 Stat. 1407.

There is no contention here that the Special Jurisdictional Act has infringed upon or limited the general jurisdictional powers granted to the Court of Claims by Congress. Hence, what Congress did in enacting the Special Legislative Act was to superimpose upon the general juris-

diction of the Court the power to eliminate the Statute of Limitations, and in this Special Act, set up a yardstick and marker by which the Court could determine the location and the amount of the acreage involved. With this factor known, it could then determine the fair value of the land taken by the United States.

There can be no question but that the Committees of both Houses of Congress in passing this Special Act were aware of and knew the contents of the Box Elder Treaty of July 30, 1863; that this Treaty contained a map, which together attached to contemporaneous Treaties of other divisions of this tribe, clearly set forth the area involved; that from these maps the Court of Claims could without great difficulty determine the acreage. If the foregoing were not so, Congress would not have made reference in the Special Act to this Treaty.

Moreover, there is no hint in the title or body of the Act that Congress had a doubt as to what the general area of territory was or where it was located. It is, therefore, respectfully submitted that what Congress had in mind was that here were Indians who had had title by possession; that this title had been recognized by Treaty and by acts of Government officials; that Congress by the Special Act was recognizing this title by possession and was desiring the Court of Claims, without any technical limitations, to determine, not the question of title, but the amount and value of the acreage, title to which, and about which, Congress had no question.

Familiar as Congress was with the Box Elder Treaty and associate treaties and with the recognition of title that had been given by representatives of the Department of the Interior and other representatives of the Government, Congress did not intend to raise any question about the Indians' title. On the contrary, it was simply reaffirming the title, and asking the Court to fix the value of the land and enter judgment for it.

Values had been determined by the Court in the past with respect to other Indian lands. Hence Congress would naturally assume that the Court could arrive, not at a minutely accurate figure per acre, but at a fair and general value.

It should be kept in mind that this area was not taken away entirely from the Indians in 1863. There has been a gradual taking, piece by piece, over a number of years.

Only to guide the Court and eliminate the question of title, did Congress make reference to the Box Elder Treaty.

Instead of responding to the Congressional intention, it is respectfully submitted that the lower Court went far beyond this intention in seeking to determine, first of all, whether the Indians had a title, a matter which the Senate had already confirmed and which the special legislation recognized.

3. The Indian Congress is greatly disturbed over the language in the majority opinion as to apparent tests with respect to title. One of them appears to be the number of these Shoshone Indians living at the time of the Treaty, in 1863. It is said that there were about 1,500 to 1,800, and that they claimed ten million acres then, and now claim six million additional.

Title has never before been determined by numbers but by dominance, possession and control of an area. If this new test is adopted, it will set up a dangerous precedent.

4. The language of Mr. Justice Black and Mr. Justice Jackson in concurring with the majority is also disturbing to these Indians. The argument is made, and apparently against the granting of a money judgment, that if such were granted the money would be earmarked in the Treasury and "after counsel are thus paid, not a cent is put into the reach of the Indians;". This may be true for the time being, but two years hence Congress may decide to vote a cash distribution of the judgment money to the Indians.

Congress is constantly changing the status of Indian money in the United States Treasury. For example, it has

restricted the funds derived from the allotments of restricted Indians. It has determined restrictions from time to time by the amount of Indian blood. If an Indian does not possess certain Indian restrictions, his money in the Treasury may cease to be restricted and his allotment no longer exempted from taxation. Again, Congress has placed restrictions on Indian funds and later extended the restriction. Congress can terminate those restrictions at any date and the moneys can be distributed to the Indians.

5. The concurring opinions of Mr. Justice Black and Mr. Justice Jackson would seem to argue that a moral duty is not sufficient or too difficult a basis upon which Congress could legislate funds for the Indians. It would appear in this case that there was not only a moral but a legal duty involved. These Justices admit the moral duty but say that it is unfortunate to try to measure it. However, Congress has the power to legislate funds in favor of a moral obligation and it can empower the Court of Claims to act for it in determining the amount to be adjudicated.

It is quite conceivable that in the event that evidence were lost or destroyed and a citizen could not prove his claim, but it was generally known that there was a moral obligation on the part of the United States to aid him, that Congress would have the power, without its right being questioned by a Court, to determine the value of the moral obligation and to pay it either by direct legislation or by making the Court of Claims its agent to estimate and fix the amount of the moral obligation. So, it is respectfully submitted that there does not seem to be a real basis for refusal, simply because the Court may have to go back three-quarters of a century, or there is no written evidence of intention, and so a recovery could not be allowed by the Court of Claims, acting as the agent or representative of Congress.

6. Finally, the members of the Indian Association are disturbed by what appears from the majority opinion to

be a departure from the rule laid down in *Worcester* v. *Georgia*, 6 Peters 515, and many subsequent cases of this Court, to the effect that a treaty with the Indians should be interpreted according to the understanding of unlettered and inexperienced peoples, rather than the meaning that would be imposed upon a reasonably educated white citizen. It is respectfully submitted that these unlettered Shoshones, when they surrendered rights of way over territory that had been occupied and dominated by them even beyond their memory, under a treaty that was mutually executed by the United States with them, was a recognition of the giving up of something over which they had control. This could not be understood otherwise by them.

CONCLUSION.

The Indian Association is more than usually disturbed now because it is attempting to assist in settling once for all the claims of the respective tribes against the United States, and it fears that the language of the majority opinions here expressed may by analogy throw grave clouds upon the titles of these respective tribes and set up new tests that may have the effect of excluding recovery if such tests have to be met.

It is respectfully submitted that the instant case is a very simple one, for if title is involved, then we have the recognition by Congress in the Treaty, supported by all of the actions of administrative and executive officers of the Government, leading up to the Treaty. If, however, title is not involved, but only area and value, then the case is even more simple, because all of the determining factors are found in the Box Elder Treaty and its associate treaties except one, and that is the value of this property. In times past the Court of Claims has put values on Indian lands in the west, where it had no more evidence as to value than it has now. Therefore, it would seem that a judgment in

dollars could be found easily, and reasonably justified by the Court of Claims.

Respectfully submitted,

HUSTON THOMPSON,
General Counsel for The National Congress of American Indians.

Dated at Washington, D. C.,
April 5, 1945.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 63

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,

Petitioners,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MOTION IN THE ALTERNATIVE EITHER (1) TO RECALL AND AMEND THE MANDATE TO THE COURT OF CLAIMS SO AS TO DIRECT THAT COURT TO MAKE APPROPRIATE ADDITIONAL FINDINGS AS TO THE UNDERSTANDING AND INTENTION OF PETITIONERS RESPECTING RECOGNITION OF THEIR ABORIGINAL TITLE TO LANDS BY THE TREATY OF BOX ELDER WITH THE UNITED STATES, WITH LEAVE TO AMEND OTHER FINDINGS, AND TO ENTER APPROPRIATE CONCLUSIONS OF LAW AND JUDGMENT THEREON, OR (2) FOR LEAVE FOR PETITIONERS TO FILE A MOTION IN SAID COURT FOR SUCH FURTHER AND AMENDED FINDINGS AND FOR SAID COURT TO ENTERTAIN SUCH MOTION, MAKE SUCH FINDINGS, AND ENTER APPROPRIATE CONCLUSIONS OF LAW AND JUDGMENT THEREON.

ERNEST L. WILKINSON,
Counsel for Petitioners.

JOHN W. CRAGUN,
JOSEPH CHEZ,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 63

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,

Petitioners,

vs.

THE UNITED STATES

MOTION IN THE ALTERNATIVE EITHER (1) TO RECALL AND AMEND THE MANDATE TO THE COURT OF CLAIMS SO AS TO DIRECT THAT COURT TO MAKE APPROPRIATE ADDITIONAL FINDINGS AS TO THE UNDERSTANDING AND INTENTION OF PETITIONERS RESPECTING RECOGNITION OF THEIR ABORIGINAL TITLE TO LANDS BY THE TREATY OF BOX ELDER WITH THE UNITED STATES, WITH LEAVE TO AMEND OTHER FINDINGS, AND TO ENTER APPROPRIATE CONCLUSIONS OF LAW AND JUDGMENT THEREON, OR (2) FOR LEAVE FOR PETITIONERS TO FILE A MOTION IN SAID COURT FOR SUCH FURTHER AND AMENDED FINDINGS AND FOR SAID COURT TO ENTERTAIN SUCH MOTION, MAKE SUCH FINDINGS, AND ENTER APPROPRIATE CONCLUSIONS OF LAW AND JUDGMENT THEREON.

Come now petitioners, The Northwestern Bands of Shoshone Indians, and respectfully move the Court either (1) to recall and amend its mandate to the Court of Claims so as to direct that Court to make appropriate additional find-

ings as to the understanding and intention of petitioners respecting the question of recognition of their aboriginal title to lands by the treaty of Box Elder with the United States (13 Stat. 863), with leave to amend other findings, and enter appropriate conclusions of law and judgment thereon, or (2) for leave for petitioners to file a motion in said Court for such additional and amended findings and for said Court to entertain such motion, make such findings, and enter appropriate conclusions of law and judgment thereon.

In this case, this Court by decision of March 12, 1945 (four justices dissenting), affirmed the judgment of the Court of Claims holding that petitioners were not entitled under the terms of the jurisdictional act to recover from the United States for the taking of their ancestral domain, by reason of the fact that petitioners' right or title in that domain had not been recognized by their Treaty with the United States.[1]

The decision of this Court was based squarely upon a finding of the Court of Claims that (as this Court noted, page 8) the *United States* "did not intend that it [the treaty] should be a stipulation of recognition and acknowledgment of any exclusive use and occupancy right or title of the Indians, parties thereto * * *" This Court (id.), acknowledged that "this finding molded the opinion and judgment below" and held that it placed "the burden on

[1] Petitioners' petition asked for a judgment of $15,000,000 for the taking of some 15,000,000 acres of land, which has been taken piecemeal by the United States, the dates of taking dating from shortly after the treaty to recent years. The lower court has not yet determined the number of acres taken, nor the valuation of the land at the time of taking (in other cases the lower court has sometimes valued Indian land at 50¢ per acre—*Fort Berthold Indians* v. *United States*, 71 C. Cls. 308, 340; *Assiniboine Indians* v. *United States*, 77 C. Cls. 347, 376; *Blackfeet Indians* v. *United States*, 81 C. Cls. 101, 136) nor the amount of offsets (a report of the General Accounting Office filed in the case claims offsets of over $4,000,000 up to 1931, including items against other Shoshones.)

petitioners to overthrow the judgment of the Court of Claims" whether "the issue as to acknowledgment • • • is treated as a question of fact • • •, or as a matter of inference to be drawn by the trier of fact from the treaty and surrounding circumstances or as a conclusion of law[2] to be reviewed by this Court upon the record • • •." (pp. 8-9.)

A careful reading of this crucial finding, as well as of all the findings and the opinion below, reveals that it is a finding only as to the intention of one of the parties to the treaty —the United States—as exclusively gathered from the instructions to the Government treaty commissioners.[3] No-

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[2] If it be a question of law the appellant, other than the burden of carrying the suit forward, should have no burden to overcome; for in reviewing a trial court on a question of law, the appellate court does not have to accord to the trial court the same presumption of correctness as in the case of a finding of fact. This Court must therefore have treated the finding below substantially as a finding of fact, which, standing alone, petitioners believe, is not adequate to properly cover the question presented as to the meaning and legal and equitable consequences of the Box Elder Treaty.

[3] This finding of the Court of Claims appears to have been based on the instructions written by the Commissioner of Indian Affairs to respondents' treaty commissioners that they would not be expected to negotiate with petitioners for the *extinguishment* of any right, title, or interest in lands, and the absence of any expressed intention on the part of respondents' official to recognize petitioners' title. This Court noted that "In reaching its conclusion, the lower court pointed out • • • that nothing in the legislation or official documents, communications or instructions which brought about the treaty indicated any purpose to recognize Indian title to the territory over which the Shoshone roamed and hunted" (p. 9). This again was a finding by the lower court merely as to the affirmative purpose of one of the parties based, as we have said, upon its interpretation of the instructions to the treaty commissioners not to undertake to extinguish any right, title, or interest of petitioners (even if we were to admit, which we do not, that the acceptance by the United States of the rights which it obtained under the treaty as well as the established policy of recognizing the Indians as owning a beneficial interest in lands, did not, as a legal consequence, create a recognition of petitioners' title).

Even the acceptance by this Court of the finding that no recognition was intended by the United States was based in part on the assumption by

where in the findings of the court below is there any finding as to the intention of the petitioner Indians, either as a result of the negotiations or with respect to the provisions of the treaty, nor as to their understanding as to the recognition of their title by the language and provisions of the treaty. There is not even any finding as to whether the petitioner Indians were aware of the instructions given to the treaty commissioners, nor as to what they were informed by the treaty commissioners at the time the treaty was negotiated.[4]

Thus the ultimate opinion of both courts as to the non-recognition of petitioners' title was predicated upon a finding as to the intention of only one of the parties,—the party which, under the circumstances, had the dominant and controlling part in the negotiations and which therefore under all rules of construction should have all doubts resolved against it. There was no finding as to the intention or understanding of the subservient party—blanket Indians who not only did not understand the white man's language, but who did not read or write any language. The case should, therefore, be remanded in order to have findings

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this Court (p. 9) that the Commissioner of Indian Affairs was uncertain as to the location of petitioner Indians as revealed by the fact that he wrote of the Shoshone Nation as roaming Utah and Eastern Washington, whereas they did not by the Treaty claim any Washington land. But there was no warrant for this assumption. The explanation of the seeming difference lies in the fact that when the Commissioner wrote his letter (July 22, 1862, R. 34) a part of petitioners' land was in the Territory of Washington (which had been organized as a Territory on March 2, 1853) whereas by the time of the treaty, the Shoshones' country had been taken from the Territory of Washington and made a part of the newly created Territory of Idaho (organized as a Territory on March 2, 1863, only three months before the treaty was signed).

[4] In view of the question presented, if it were proper for the Court to make findings as to the intention of respondent, which it did, the Court should also have made findings as to the intention of petitioners, (along with the finding, which it made, that petitioners did then occupy and possess the land then claimed by them) (R. 27, 54, 72).

entered as to the intention and understanding of *both* parties to the treaty; and in the light of these new findings the trial court should be given an opportunity to modify its other findings, reappraise the entire case, and make appropriate conclusions of law.[5]

Counsel desire to assure this Court that this application is made in entire good faith and that if the case is remanded they have reason to believe that on the record in the court below, they can support and obtain new or additional findings which may completely change the result reached by this Court. The case being one of public interest and importance in the administration of Indian affairs, and involving, because it is their only tribal asset, the very existence of petitioner Indians as a tribe, no relevant issue of fact should be permitted to remain undetermined. In any event no injustice will result in the granting of this petition, whereas a denial may have that result. If the trial court makes no additional or modified findings which are favor-

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[5] Even the present finding of the trial court that the *United States* "did not intend" the treaty to "be a stipulation of recognition and acknowledgment" of Indian title is subject to serious question; and on reconsideration may be modified by the trial court. The instructions to the treaty commissioners (R. 34) that they would not be expected to negotiate with the Shoshones for the extinguishment of any right, title, or interest in their land (on which the finding of non-intention to recognize petitioners' title was based) indicates very strongly that even the Commissioner of Indian Affairs, who gave the instructions, intended that the treaty should be a recognition of Shoshone title. When coupled with the fact that the treaty commissioners were not forbidden to recognize Shoshone title but rather were instructed to obtain from the Shoshones an acknowledgment of the boundaries of the country they claimed and within which they would confine themselves (R. 34), which acknowledgment was incorporated in the respective treaties, and which the record shows was only a part of the country used by these Indians (from Oregon to the Dakota Territory) and the finding and admission of the trial Court (R. 27, 54, 72) that the petitioners occupied and possessed the land, the exclusive occupancy and possession of which they asserted and claimed to the treaty commissioners at the time the treaty was made, this conclusion becomes irresistible.

able to petitioners, the judgment will remain as it is. If on the other hand the trial court makes additional or modified findings which are favorable to petitioners, petitioners are entitled, as a matter of simple justice, to conclusions of law and a judgment based thereon.

Respectfully submitted,

THE NORTHWESTERN BANDS OF
SHOSHONE INDIANS,
ERNEST L. WILKINSON,
Counsel for Petitioners.

JOHN W. CRAGUN,
JOSEPH CHEZ,
Of Counsel.

(8535)

SUPREME COURT OF THE UNITED STATES.

No. 63.—October Term, 1944.

The Northwestern Bands of Shoshone Indians, Petitioners, *vs.* The United States.	On Writ of Certiorari to the Court of Claims.

[March 12, 1945.]

Mr. Justice Reed delivered the opinion of the Court.

The Northwestern Bands of Shoshone Indians, petitioners here, seek to recover from the United States damages estimated at fifteen million dollars for the taking of some fifteen million acres of the lands held by these Indians by aboriginal or immemorial title. This title was alleged by the Indians to have been recognized by the United States by the treaty between the petitioners and the United States at Box Elder, Utah Territory, July 30, 1863.

The suit was begun in the Court of Claims against the United States by the bands pursuant to a special jurisdictional act of Congress of February 28, 1929, 45 Stat. 1407. The Act consented to suit and recovery against the United States upon the following conditions:

"That jurisdiction be, and hereby is, conferred upon the Court of Claims, notwithstanding lapse of time or statutes of limitations, to hear, adjudicate, and render judgment in any and all claims which the northwestern bands of Shoshone Indians may have against the United States arising under or growing out of the treaty of July 2, 1863 (Eighteenth Statutes, page 685—2 Kappler, 848); treaty of July 30, 1863 (Thirteenth Statutes, page 863—2 Kappler, 850); Act of Congress approved December 15, 1874 (Eighteenth Statutes, page 291), and any subsequent treaty Act of Congress, or Executive order, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."[1]

[1] The other sections of the jurisdictional act are routine and not here involved. They provide for the employment of attorneys for the Indians, for set-offs to the United States, for review in this Court, process, service on and appearance by the Attorney General and the disposition of sums recovered.

This Court has jurisdiction to grant certiorari under the jurisdictional act and § 3(b), Act of February 13, 1925, 43 Stat. 939, as amended by Act of May 22, 1939, 53 Stat. 752; see *Colgate* v. *United States,* 280 U. S. 43. Certiorari was granted in view of the importance of the question in Indian affairs.

The suit is based upon the unlawful taking after the alleged recognition of the Indian title by the Box Elder treaty. We do not read the petition as claiming any right to compensation for the extinguishment of an Indian aboriginal title, which was unrecognized or unacknowledged by the Box Elder treaty. Under the words of the jurisdictional act, "arising under or growing out of the treaty," suit is authorized only for rights acknowledged by the treaty. The act does not authorize a suit for loss of Indian tribal rights arising from any other acts of the Unitel States. If the treaty recognized the aboriginal or Indian title, the authority to sue for the taking under the jurisdictional act is not questioned.[2] No claim is brought forward by petitioners arising under or growing out of the other treaties, acts or orders which are referred to in the jurisdictional act. See *Northwestern Bands of Shoshone Indians* v. *United States,* 95 Ct. Cl. 642, 680.[3]

The Court of Claims determined that the claim for the taking of land sued upon by petitioners did not grow out of the Box Elder treaty. Certiorari was sought and granted to determine whether there was "recognition" or "acknowledgement" of the Indian title by this treaty through the language employed or by the act of entering into a treaty with the Indians as to the use by the United States of lands which were claimed by the petitioners.

Even where a reservation is created for the maintenance of Indians, their right amounts to nothing more than a treaty right of occupancy. *Shoshone Tribe* v. *United States,* 299 U. S. 476, 496. Prior to the creation of any such area, formally acknowledged

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[2] The claim upon which the Indian Affairs Committee of the House based its recommendation for the passage of an identical jurisdictional act was a claim for the taking of this aboriginal title which the Committee said was recognized by the Box Elder treaty. H. Rep. No. 1030, 70th Cong., 1st Sess.; cf. United States v. Creek Nation, 295 U. S. 103, 108.

[3] In a similar jurisdictional act for the benefit of the Eastern Shoshone the question of whether their claim arose under or grew out of a certain treaty was not involved. That treaty, Fort Bridger, July 3, 1868, specifically recognized and set apart a reservation for the Eastern Shoshone. Art. II, 15 Stat. 673; 44 Stat. 1349; Shoshone Tribe v. United States, 299 U. S. 476.

by the United States as subject to such right of Indian occupancy, a certain nation, tribe or band of Indians may have claimed the right because of immemorial occupancy to roam certain territory to the exclusion of any other Indians and in contradistinction to the custom of the early nomads to wander at will in the search for food. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339. 345. This claim has come to be known as Indian title and is likewise often spoken of as the right of occupancy. To distinguish from a recognized right of occupancy, we shall refer to the aboriginal usage without definite recognition of the right by the United States as Indian title.

Since *Johnson* v. *M'Intosh*, 8 Wheat. 543, decided in 1823, gave rationalization to the appropriation of Indian lands by the white man's government, the extinguishment of Indian title by that sovereignty has proceeded, as a political matter, without any admitted legal responsibility in the sovereign to compensate the Indian for his loss. Exclusive title to the lands passed to the white discoverers, subject to the Indian title with power in the white sovereign alone to extinguish that right by "purchase or conquest." 8 Wheat. at 574, 585-88. The whites enforced their claims by the sword and occupied the lands as the Indians abandoned them.[4] Congress has authorized suits on the original Indian title but no recovery has as yet been obtained on that ground. See *Coos Bay Indian Tribe* v. *United States*, 87 Ct. Cl. 143; cf. *The Wichita Indians* v. *United States*, 89 Ct. Cl. 378, 413, 414. In this case, however, the success of the claim depends not upon proof of the Indian title, which may be admitted, 95 Ct. Cl. at 690, but upon recognition of that title by the Box Elder treaty. It is quite understandable from the point of view of both petitioners and Congress that the Government should limit its submission to suits to claims under the boundaries if acknowledged by the treaty rather than to consent to judicial examination of claims for taking the unknown area of their possible Indian title.[5] The Shoshone

[4] Beecher v. Wetherby, 95 U. S. 517, 525; Buttz v. Northern Pacific Railroad, 119 U. S. 55, 70; Lone Wolf v. Hitchcock, 187 U. S. 553, 564; United States v. Santa Fe Pacific R. Co. 314 U. S. 339, 347.

[5] Letter of Commissioner Doty, transmitted by Message of the President, January, 1864, Executive K, L, M, N, O, 38th Cong., 1st Sess., p. 17:

"As none of the Indians of this country have permanent places of abode, in their hunting excursions they wander over an immense region, extending from the fisheries at and below Salmon falls, on the Shoshonee river, near the Oregon line, to the sources of that stream, and to the buffalo country beyond."

Indian title was in Indian country (Act to regulate trade and intercourse with the Indian tribes, 4 Stat. 729; *Bates* v. *Clark*, 95 U. S. 204, 206-208) and as a consequence subject to all the uncertainties of definition of boundaries and difficulties of proof to establish aboriginal title for tribes with a shifting habitat.

The decisive question in this case is whether it was intended by the Northwestern Shoshone or Box Elder Treaty of July 30, 1863, to recognize or acknowledge by implication the Indian title to the lands mentioned in that treaty. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347. From such recognition or acknowledgement by this treaty would flow a right of occupancy which would be compensable under the jurisdictional act.

Full findings of fact appear with the opinion below in *The Northwestern Bands of Shoshone Indians* v. *United States*, 95 Ct. Cl. 642. These findings show that petitioners here, the Northwestern bands, were at the time of the treaty a part of the Shoshone tribe, a nomadic Indian nation of less than ten thousand people which roamed over eighty million acres of prairie, forest and mountain in the present states of Wyoming, Colorado, Utah, Idaho and Nevada. The group with which we are concerned was comprised of some fifteen or eighteen hundred persons and claimed, by the treaty, Indian title to some ten million acres and now claim compensation for over six million additional acres.

After the discovery of gold in California, white travelers and settlers began to traverse and people the Shoshone domain with the result that the Indians' game disappeared from their hunting grounds. Racial relations degenerated to the point that Indian depredations interfered with travel and settlement, the overland mails and the new telegraph lines. By the time of the outbreak of the Civil War the Commissioner of Indian Affairs, the agents and superintendents of the Shoshone territory were aware of the misery of the Shoshones, the dangers to the emigrant trains and need for peace to enable travel and settlement in the area. Word had reached the Commissioner from his superintendent in Utah that the Shoshone were inclined toward accepting support on limited reservations and were willing in return to cede their other lands to the United States.

On July 5, 1862, 12 Stat. 512, 529, Congress appropriated $20,000 for defraying the expenses of negotiating a treaty with the Shoshones. The appropriation followed a letter from the

Secretary of the Interior to the chairman of the House Committee on Indian Affairs expressing the view that the lands owned by the Indians of Utah were largely unfit for cultivation and that it was "not probable that any considerable portion of them will be required for settlement for many years." A special commission was promptly appointed and instructed that it was not expected that the proposed treaty would extinguish Indian title to the lands but only secure freedom from molestation for the routes of travel and "also a definite acknowledgment as well of the boundaries of the entire country they claim as of the limits within which they will confine themselves, which limits it is hardly necessary to state should be as remote from said routes as practicable."

As the distances made it impracticable to gather the Shoshone Nation into one council for treaty purposes, the commissioners made five treaties in an endeavor to clear up the difficulties in the Shoshone country. These are set out in full in the report below. 95 Ct. Cl. 642. Four will be found also in 13 Stat. 663, 681, and 18 Stat. 685, 689. The fifth or Mixed Band treaty was not proclaimed. It is at 5 Kappler 693. It is sufficient here to say that by the treaties the Indians agreed not to molest travelers, stage coaches, telegraph lines or projected railroads.[6] All the

[6] Articles II and III from the Fort Bridger treaty of July 2, 1863, the one first made, will illustrate the type of agreement:

"ARTICLE II. The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be and remain forever free and safe for the use of the Government of the United States, and of all emigrants and travellers under its authority and protection, without molestation or injury from any of the people of said nation. And if depredations should at any time be committed by bad men of their nation, the offenders shall be immediately seized and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over said routes is hereby guaranteed by said nation. Military agricultural settlements and military posts may be established by the President of the United States along said routes; ferries may be maintained over the rivers wherever they may be required; and houses erected and settlements formed at such points as may be necessary for the comfort and convenience of travellers.

"ARTICLE III. The telegraph and overland stage lines having been established and operated through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said nation; and that their property, and the lives of passengers in the stages, and of the employees of the respective companies shall be protected by them.

"And further, it being understood that provision has been made by the Government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by said nation that said

Shoshone treaties were similar in form. They show that the boundaries claimed, as petitioner points out, covered the entire Shoshone country. After all five were negotiated Commissioner Doty was able to trace a rough map of the Shoshone country to show the Commissioner of Indian Affairs "the exterior boundaries of the territories claimed by the *Shoshonees* in their recent treaties, as also the lines of the country occupied by different portions of the tribe indicated upon it as correctly as the map will allow." He had asked Indian Affairs for the map upon which this information was traced "to show the boundaries of the country ceded by the Shoshones."

Petitioners' treaty, the Northwestern Shoshone Treaty, needs to be set out in full for ready examination. It reads as follows:

"Articles of agreement made at Box Elder, in Utah Territory, this 30th day of July, A. D., 1863, by and between the United States of America, represented by Brigadier-General P. Edward Connor, commanding the military district of Utah, and James Duane Doty, commissioner, and the northwestern bands of the Shoshonee Indians, represented by their chiefs and warriors:

ARTICLE I. It is agreed that friendly and amicable relations shall be reestablished between the bands of the Shoshonee Nation, parties hereto, and the United States, and it is declared that a firm and perpetual peace shall be henceforth maintained between the said bands and the United States.

ARTICLE II. The treaty concluded at Fort Bridger on the 2nd day of July, 1863, between the United States and the Shoshonee Nation, being read and fully interpreted and explained to the said chiefs and warriors, they do hereby give their full and free assent to all of the provisions of said treaty, and the same are hereby adopted as a part of this agreement, and the same shall be binding upon the parties hereto.

ARTICLE III. In consideration of the stipulations in the preceding articles, the United States agree to increase the annuity

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railway, or its branches, may be located, constructed, and operated, without molestation from them, through any portion of the country claimed by them."

Article IV relating to boundaries in this Fort Bridger treaty reads as follows:

"It is understood the boundaries of the Shoshonee country, as defined and described by said nation, is as follows: On the north, by the mountains on the north side of the valley of Shoshonee or Snake River; on the east, by the Wind River mountains, Peenahpah river, the north fork of Platte or Koochin-agah, and the north Park or Buffalo House; and on the south, by Yampah river and the Uintah mountains. The western boundary is left undefined, there being no Shoshonees from that district of country present; but the bands now present claim that their own country is bounded on the west by Salt Lake." 18 Stat. 685-6

to the Shoshonee nation five thousand dollars, to be paid in the manner provided in said treaty. And the said northwestern bands hereby aeknowledge to have received of the United States, at the signing of these articles, provisions and goods to the amount of two thousand dollars, to relieve their immediate necessities, the said bands having been reduced by the war to a state of utter destitution.

ARTICLE IV. The country claimed by Pokatello, for himself and his people, is bounded on the west by Raft River and on the east by the Porteneuf Mountains." 13 Stat. 663.

Before it or the other treaties were ratified by the Senate an additional article was added to each and, except for one treaty not further involved here, accepted by the Indians. The addition reads as follows:

"Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof."

The portions of the Fort Bridger treaty of July 2, 1863, of any possible effect will be found in note 6, *supra.*

Subsequent to the ratification of the treaties, an act of Congress was passed on February 23, 1865, 13 Stat. 432, for the extinction of Indian title to lands in Utah territory; and another act on July 20, 1867, 15 Stat. 17, for dealing with hostile Indians and choosing reservations for Indians dwelling east of the Rocky Mountains. None of the Shoshones entered into treaties under either of these acts except the Eastern Shoshones who had signed the Fort Bridger treaty of July 2, 1863. On July 3, 1868, they relinquished all claim to United States territory except a reservation in Wyoming of 3,047,730 acres. 15 Stat. 673. No other treaty or other formal arrangement has been made between petitioners and the United States dealing with their lands.[7]

[7] The Court of Claims summarized the history of the petitioner bands, subsequent to the Box Elder treaty, in this way:

"After the making of the treaty of July 30, 1863, the plaintiff bands became widely scattered over northern Utah and Nevada, and southern Idaho. In 1873 the Commissioner of Indian Affairs appointed a commission to investigate all tribes and bands in this region and to ascertain their number and the probability of gathering them upon one or more reservations where they could be more immediately under the care of the Government. The commission made an exhaustive investigation into the matters entrusted to it and reported that it had no trustworthy information as to the number of bands of the Northwestern Shoshone Indians. The commission further reported that a part of the Northwestern Shoshones under Pocatello (who signed

Without seeking any cession or relinquishment of claim from the Shoshone, except the Eastern Shoshone relinquishment of July 3, 1868, just referred to, the United States has treated the rest of the Shoshone territory as a part of the public domain. School lands were granted. 13 Stat. 32; 26 Stat. 216; 28 Stat. 109. National forests were freely created. 33 Stat. 2307; 34 Stat. 3099, 3198, 3206, 3247, 3251; 37 Stat. 1678. The lands were opened to public settlement under the homestead laws. Report of the Commissioner of the General Land Office (1868), pp. 55, 59, 63; Report of the Commissioner of the General Land Office (1869), pp. 163, 168, 177. Thus we have administration of this territory by the United States proceeding as though no Indian land titles were involved.

The Court of Claims examined the evidence adduced before it and reached the conclusion as a finding of fact that the United States "did not intend that it [the treaty] should be a stipulation of recognition and acknowledgement of any exclusive use and occupancy right or title of the Indians, parties thereto . . . . The treaty was intended to be, and was, a treaty of peace and amity with stipulated annuities for the purposes of accomplishing those objects and achieving that end." 95 Ct. Cl. at 676. This finding molded the opinion and judgment below. Whether the issue as to acknowledgment by a treaty of Indian title to land is treated as a question of fact, like Indian right to occupancy itself, *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339,

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the treaty of July 30, 1863) had already gone to the Fort Hall (Idaho) Reservation in southeast Idaho, and that Chief Tav-i-wun-shea, with his small band, had gone to the Wind River (Wyoming) Reservation created and set apart under the treaty with the Eastern Shoshones in 1868. Toomontso (who had signed the Northwestern Treaty of July 30) and his band at about this time took up their abode on the Fort Hall Indian Reservation and an indefinite number of Indians of this band had gone to the Wind River Reservation. Eventually the remnants of the bands of Indians under San Pitz (a signer of the Northwestern Shoshone treaty of July 30), and Saigwits, also a party to the treaty, were induced by the commission to remove to the Fort Hall Indian Reservation, thus making a total of 400 Northwestern Shoshone Indians on the Fort Hall Reservation. The commission further reported that a careful enumeration disclosed that there were 400 Northwestern Shoshone Indians in southern Idaho. In 1873 a number of Northwestern Shoshone Indians had gathered in northeastern Nevada and were assigned by the Indian Agent in Nevada to a small area in that section as a home. On May 10, 1877, this tract, by order of the President, was withdrawn from sale or settlement and set apart as a reservation for the Northwestern Shoshone Indians. However, in 1879, all the Indians thereon, numbering about 300, were removed to the Western Shoshone Indian Reservation known as the Duck Valley Indian Reservation in southwestern Idaho and northern Nevada." 95 Ct. Cl. at 677.

345; 53 Stat. 752, or as a matter of inference to be drawn by the trier of fact from the treaty and surrounding circumstances or as a conclusion of law to be reviewed by this Court upon the record, this finding places the burden on petitioners to overthrow the judgment of the Court of Claims. In reaching its conclusion, the lower court pointed out in its opinion that nothing in the legislation or official documents, communications or instructions which brought about the treaty indicated any purpose to recognize Indian title to the territory over which the Shoshone roamed and hunted. The commissioners were instructed specifically on July 22, 1862, that they were not expected to negotiate for the extinction of the Indian title but for the security of routes over the lands and "a definite acknowledgment as well of the boundaries of the entire country they [the Indians] claim." The letter shows uncertainty as to the location of the bands. The Commissioner of Indian Affairs wrote of the Shoshone nation as roaming Utah and Eastern Washington but the very indefiniteness of the information required a statement from the Indians of their claims. 95 Ct. Cl. at 690. The Commissioner learned from the treaties that the Shoshones claimed territory in Colorado, Wyoming, Idaho, and Nevada aggregating several times the acreage in Utah. There apparently was no claim to Washington land. Commissioner Doty's letter transmitting the map describing the territories claimed by the Shoshones and telling of the negotiations has nothing that indicates the possibility of an acknowledgement by the United States of the Indian title to any of the lands. See note 5, *supra*.

An examination of the text of the Northwestern Shoshone Treaty and the others which were entered into with the other Shoshone tribes, 95 Ct. Cl. 642, shows the commissioners carefully followed their instructions. In the Eastern Shoshone treaty, the boundaries are spoken of "as defined and described by said nation," note 6, *supra*. In the Northwestern Shoshone Treaty the land is described as "The country claimed by Pokatello, for himself and his people." In the Western Shoshone treaty permission was given for mineral prospecting and extracting and the boundaries are said to define "the country claimed and occupied." The same language is used as to the boundaries in the Shoshonee-Goship Treaty. This treaty also permitted prospecting for and the working of mines. The Mixed Bands treaty de-

scribed a country "claimed by the said bands" and "as described by them." Nowhere in any of the series of treaties is there a specific acknowledgment of Indian title or right of occupancy. It seems to us a reasonable inference that had either the Indians or the United States understood that the treaties recognized the Indian title to these domains, such purpose would have been clearly and definitely expressed by instruction, by treaty text or by the reports of the treaty commissioners, to their superiors or in the transmission of the treaties to the Senate for ratification.

Petitioners argue that the permission from the Indians for travel or mining and for the maintenance of communication and transportation facilities by the United States for its citizens imply a recognition by the United States of the Indian title. They quote, as persuasive, these words from an early Indian case: "The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withold them." *Worcester* v. *Georgia*, 6 Pet. 515, 556. An examination of the circumstances under which this Court made the just-quoted statement illustrates how inapposite its use by petitioners is to the present question. The quotation was written in explanation of rights of passage which were granted by the Cherokees through lands which by other articles of the treaty had been specifically set apart and solemnly guaranteed to the Cherokees. 7 Stat. 39. No such specific recognition is in the Box Elder treaty. But we see nothing inconsistent with non-recognition of the Indian title and the insertion of these provisions against molestation of structures, travelers or exploiters of mineral deposits within the territories. The United States undoubtedly might have asserted, at the time of the treaty, its purpose to extinguish Indian title or it might have recognized Indian title or it might, as the Court of Claims held, sought only freedom from hostile acts from roving bands by the commitments for supplies. The treaties were made in the midst of civil war and before the outcome of that conflict was clear.

Petitioners urge that recognition of the Indian title was inferred from the language of the Fort Laramie treaty of September 17, 1851, 11 Stat. 749, *Fort Berthold Indians* v. *United States*, 71 Ct. Cl. 308; *Assiniboine Indian Tribe* v. *United States*, 77 Ct. Cl. 347, 370; *The Crow Nation* v. *United States*, 81 Ct. Cl. 238, 272, and that a different inference in the present case is incon-

sistent with those holdings. Apart from the fact that different treaties are involved, the circumstances surrounding the execution of the Fort Laramie treaty indicate a purpose to recognize the Indian title to the lands described in the Fort Laramie treaty which may well have induced the Court of Claims to reach one conclusion in those cases and another in this. For example, the instructions to the commissioners for the Fort Laramie negotiations contained this direction:

"It is important, if practicable, to establish for each tribe some fixed boundaries within which they should stipulate generally to reside, and each should agree not to intrude within the limits assigned to another tribe without its consent." 71 Ct. Cl. 312.

Further in reporting the treaty, it was said:

"The laying off of the country into geographical, or rather national domains, I regard as a very important measure, inasmuch as it will take away a great cause of quarrel among themselves, and at the same time enable the Government to ascertain who are the depredators, should depredations hereafter be committed." 71 Ct. Cl. 313.

Furthermore, the words of the Fort Laramie treaty are more apt to express recognition of Indian title than those of Box Elder. Article 5 says:

"The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz: . . ." 71 Ct. Cl. 315.

In consideration of the treaty stipulations the United States bound itself to furnish supplies and to protect the Indian nations against depredations by its citizens. Such distinctions may quite justifiably have led the Court of Claims to different conclusions than it reached from consideration of the Northwestern Shoshone treaty.[8]

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[8] We note but consider unimportant, because this issue was not involved, casual references by this and other courts that the Shoshone treaties recognized Indian title in the Shoshones. Shoshone Tribe *v.* United States, 299 U. S. 476, 485; United States *v.* Shoshone Tribe, 304 U. S. 111, 113; Shoshone Indians *v.* United States, 85 Ct. Cl. 331, 335; United States *v.* Board of Com'rs of Fremont County, Wyo., 145 F. 2d 329.

We do not consider the references of the administrators in routine communications called for in the preparation of this case before the Court of Claims to the "Shoshoni Indian Reservation (Northwestern Band)" to the fact that the territory of the Shoshones "was recognized by the United States" or "set apart for the Shoshone Indians" of any more weight. Nothing in these statements shows that the attention of the administrators was focused

Petitioners point out that the word "claim" or the phrase "country claimed" was often used on the frontier to indicate title or right. We know this meaning in mining law and in entries for land patents. The meaning of the word or phrase depends upon its use. In these treaties it seems clearly to designate the boundaries over which the Indians asserted Indian title but that falls short of acknowledgment of such right by the United States.

Reliance is also placed by petitioners upon the Senate's amendment to the treaty[9] as a limitation of the treaty's recognition of Indian title to the described lands. This limitation, petitioners argue, demonstrates that no other limitation was intended. Petitioners take the position that there was no need for this limitation "if the treaty recognized no rights." While such a limitation would not have been needed if the Senate of that day were positive, on weighing the issue as we now do, that the treaty was ineffective to give any additional color to Indian titles within or without the Mexican Cession, it is unlikely that the ratifying body could or did appraise the several possibilities which are now presented. The Senate was well acquainted with the complications of Mexican land titles in the Cession. A portion of the lands lay within the boundaries of the former Mexican state of Alta California. The Senate was familiar, too, with the legal position of Indian titles in the Shoshone country outside the Mexican Cession.[10] Such titles were subject to the same rules as similar titles in all Indian country. 4 Stat. 729. The status of Indian titles within the Mexican Cession of 1848, however, had

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on the problem of recognition or that they reflected a contemporaneous interpretation.

It does not seem important to determine whether the Court of Claims abused its discretion in refusing admission to such administrative letters written in 1939, relating to preparation for this suit, of maps of the territory. We have examined the tendered evidence. It was also seen by the Court of Claims and if it had been admitted it would have been merely cumulative and could not have changed the conclusion below.

[9] "Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof."

[10] Spanish claims north of the 42nd parallel of latitude, then the northern line of Mexico, were ceded to the United States in 1821, Treaties and Other International Acts of the United States, Vol. 3, p. 3, and Art. 8; Russian claims south of 54° 40′ north latitude in 1824, *op. cit.* p. 151 and Art. 3; and the British claims south of north latitude 49° in 1846, *op. cit.*, Vol. 5, p. 3 and Art. III.

not then been judicially determined.[11] The treaty of Guadalupe Hidalgo guaranteed the property rights of Mexicans in the Cession.[12] Controversies over these rights had caused the rejection by the Senate of Article X of the treaty as submitted.[13] The rejection was followed by the protocol of Queretaro of 1848 in which our commissioners for the exchange of ratifications undertook to make explanation to Mexico of the rejection of Article X.[14] The protocol itself was a subject of House and Senate debate and of extensive diplomatic correspondence.[15] There had been, also, the Act of March 3, 1851, 9 Stat. 631, to settle the private land claims in California, after its admission as a state. Litigation over land titles in the Mexican Cession had already reached this Court. *United States* v. *Nye*, 21 How. 408; *United States* v. *Bassett*, 21 How. 412; *United States* v. *Rose*, 23 How. 262. We do not think that the amendment indicates more than an intention to be sure the new treaty did not add to the complexities of the Mexican Cession title situation. Cf. *Barker* v. *Harvey*, 181 U. S. 481, 491; *United States* v. *Title Ins. Co.*, 265 U. S. 472, 484.

Petitioners suggest that in the construction of Indian treaties we, as a self-respecting nation, hesitate to construe language, which is selected by us as guardian of the Indians, to our ward's prejudice. "All doubts," say petitioners, "must be resolved in their

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[11] Barker *v.* Harvey, 181 U. S. 481, Cramer *v.* United States, 261 U. S. 219; United States *v.* Santa Fe Pacific R. Co., 314 U. S. 339.

[12] 5 Treaties *op. cit., supra*, 207, Art. VIII and IX. United States *v.* O'Donnell, 303 U. S. 501, 504.

[13] Treaties and Other International Acts of the United States, Vol. 5, pp. 242, 245:

"ARTICLE X. All grants of land made by the Mexican Government or by the competent authorities, in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid, to the same extent that the same grants would be valid, if the said territories had remained within the limits of Mexico. . . ."

[14] The explanation in the second article of the protocol was as follows:

"SECOND. The American Government by suppressing the Xth article of the Treaty of Guadalupe did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the Treaty, preserve the legal value which they may possess; and the grantees may cause their legitimate titles to be acknowledged before the american tribunals.

"Conformably to the law of the United States, legitimate titles to every description of property personal and real, existing in the ceded territories, are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th of May 1.846, and in Texas up to the 2d March 1.836." Treaties, *id.*, vol. 5, p. 381.

[15] See Treaties, *id.*, vol. 5, pp. 380-406, particularly p. 387.

[the Indians'] favor." Mr. Justice McLean, concurring in *Worcester* v. *Georgia*, 6 Pet. 515 at 582, said, "The language used in treaties with the Indians should never be construed to their prejudice." But the context shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty.[16] That, we think, is the rule which this Court has applied consistently to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress.[17]

It seems to us clear from the circumstances leading up to and following the execution of the Box Elder Treaty that the parties did not intend to recognize or acknowledge by that treaty the Indian title to the lands in question. Whether the lands were in fact held by the Shoshones by Indian title from occupancy or otherwise or what rights flow to the Indians from such title is not involved. Since the rights, if any the Shoshones have, did not arise under or grow out of the Box Elder treaty, no recovery may be had under the jurisdictional act.

Affirmed.

Mr. Justice ROBERTS is of the view that the judgment should be reversed.

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[16] This is the meaning of the other cases which are cited by petitioners upon this point, Jones v. Meehan, 175 U. S. 1, 10-12; United States v. Winans, 198 U. S. 371, 380; Marlin v. Lewallen, 276 U. S. 58, 64; United States v. Payne, 264 U. S. 446, 448-49; Nor. Pac. Ry. Co. v. United States, 227 U. S. 355, 366; Seufert Bros. Co. v. United States, 249 U. S. 194, 198; United States v. Shoshone Tribe, 304 U. S. 111, 116; see also Tulee v. Washington, 315 U. S. 681, 684.

[17] United States v. Choctaw &c. Nations, 179 U. S. 494, 534-36; Choctaw Nation v. United States, 318 U. S. 423, 432.

Mr. Justice JACKSON, concurring.

Mr. Justice BLACK and I think it may be desirable to state some of the difficulties which underlie efforts to leave such an Indian grievance as this to settlement by a lawsuit.

It is hard to see how any judicial decision under such a jurisdictional act can much advance solution of the problem of the Shoshones. Any judgment that we may render gives to these

Indians neither their lands nor money. The jurisdictional act provides that the proceeds above attorneys' fees shall "be deposited in the Treasury of the United States to the credit of the Indians" at 4 per cent interest and "shall be subject to appropriation by Congress only for the health, education, and industrial advancement of said Indians." The only cash payment is attorneys' fees. Section 7 provides that the Court of Claims shall determine a reasonable fee, not to exceed 10 per cent of the recovery, together with expenses, to be paid to the attorneys for the Northwestern Bands out of the sums found due. After counsel are thus paid, not a cent is put into the reach of the Indians; all that is done for them by a judgment is to earmark some funds in the Treasury from which Congress may as it sees fit from time to time make appropriations "for the health, education, and industrial advancement of said Indians." Congress could do this, of course, without any judgment or earmarking of funds, as it often has done. Congress, even after judgment, still must decide the amount and times of payment to the Indians according to their needs.

We would not be second to any other in recognizing that—judgment or no judgment—a moral obligation of a high order rests upon this country to provide for decent shelter, clothing, education, and industrial advancement of the Indian. Nothing is gained by dwelling upon the unhappy conflicts that have prevailed between the Shoshones and the whites—conflicts which sometimes leave one in doubt which side could make the better claim to be civilized. The generation of Indians who suffered the privations, indignities, and brutalities of the westward march of the whites have gone to the Happy Hunting Ground, and nothing that we can do can square the account with them. Whatever survives is a moral obligation resting on the descendants of the whites to do for the descendants of the Indians what in the conditions of this twentieth century is the decent thing.

It is most unfortunate to try to measure this moral duty in terms of legal obligations and ask the Court to spell out Indian legal rights from written instruments made and probably broken long ago and to put our moral duty in figures as legal damages. The Indian problem is essentially a sociological problem, not a legal one. We can make only a pretense of adjudication of such claims, and that only by indulging the most unrealistic and fictional assumptions.

Here we are asked to go back over three quarters of a century to spell out the meaning of a most ambiguous writing made in 1863. One of the parties did not keep, or know how to keep, written records of negotiations. Written evidence bearing on intention is only that which the whites chose to make. It does not take a particularly discerning eye to see that these records, written usually by Indian agents, are quite apt to speak well of the writer's virtue and good intentions. Evidence from the memory of man is no longer available. Even if both parties to these agreements were of our own stock, we being a record-keeping people, a court would still have the gravest difficulty determining what their motives and intentions and meanings were. Statutes of limitations cut off most such inquiries, not because a claim becomes less just the longer it is denied, but because another policy intervenes—the policy to leave in repose matters which can no longer be the subject of intelligent adjudication.

Even if the handicap of time could be overcome, we could not satisfactorily apply legal techniques to interpretation of this treaty. The Indian parties to the treaty were a band of simple, relatively peaceful, and extremely primitive men. The population of the band was only about 1500, and the territories claimed to have been occupied as their home consisted of over 15,000,000 acres of land in Idaho, Utah, and Nevada—about 10,000 acres for every individual in the band. Of course so few could not patrol and defend so vast a territory against inroads by the more aggressive and efficient whites. The white was a better killer. The game disappeared, the lands were not productive, and in peace the Indians became destitute. Desperation stimulated or perhaps produced predatory tendencies and they began to fall upon the overland caravans and to steal and rob. The whites brought forth their armies and reduced the Indians to submission. Then the whites "negotiated" a treaty.

We realize that for over a century it has been a judicial practice to construe these "agreements" with Indians, as if they were contracts between white men. In some cases, where the provisions are simple and definite and deal with concrete lands or matters, this may be practicable. But despite antiquity of the custom, to apply the litigation process to such a problem as we have here seems far fetched. The most elemental condition of a bargain was not present, for there was nothing like equality of bar-

gaining power. On one side were dominant, powerful, shrewd, and educated whites, who knew exactly what they wanted. On the other side were destitute, illiterate Indians who primarily wanted to be let alone and who wanted by some means to continue to live their own accustomed lives. Here we are asked to decide whether their intent was to relinquish titles or make reservations of titles or recognition of titles. The Indian parties did not know what titles were, had no such concept as that of individual land title, and had no sense of property in land. Here we are asked to attribute legal meanings to subscribers of a written instrument who had no written language of their own in which to express any meaning. We doubt if any interpreter could intelligently translate the contents of a writing that deals with the property concept, for the Indians did not have a word for it. People do not have words to fit ideas that have never occurred to them. Ownership meant no more to them than to roam the land as a great common, and to possess and enjoy it in the same way that they possessed and enjoyed sunlight and the west wind and the feel of spring in the air. Acquisitiveness, which develops a law of real property, is an accomplishment only of the "civilized."

Of course the Indians may have had some vague idea that thereafter they were to stay off certain lands and the white men in return were to stay off certain other lands. But we do not think it is possible now to reduce such a nebulous accord to terms of common-law contract and conveyancing. The treaty was a political document. It was intended to pacify the Indians and to let the whites travel in peace a route they somehow were going to travel anyway.

How should we turn into money's worth the rights, if any, of which the Indians have been deprived? Should we measure it in terms of what was lost to a people who needed 10,000 acres apiece to sustain themselves through hunting and nomadic living, who had no system or standard of exchange, and whose representatives in making the treaty appear to have been softened for the job by gifts of blankets and trinkets? Should we measure it in terms of what was gained to our people, who sustain themselves in large numbers on few acres by greater efficiency and utilization? Of course amends can be made only to progeny in terms of their present needs as the jurisdictional Act recognizes will ultimately be done. The Indians' grievance calls for sympa-

thetic, intelligent, and generous help in developing the latent talents and aspirations of the living generation, and there is little enlightenment for that task from endless and pointless lawsuits over the negotiation of generations long gone to their rest.

We agree with Mr. Justice REED that no legal rights are today to be recognized in the Shoshones by reason of this treaty. We agree with Mr. Justice DOUGLAS and Mr. Justice MURPHY as to their moral deserts. We do not mean to leave the impression that the two have any relation to each other. The finding that the treaty creates no legal obligations does not restrict Congress from such appropriations as its judgment dictates "for the health, education, and industrial advancement of said Indians" which is the position in which Congress would find itself if we found that it did create legal obligations and tried to put a value on them.

Mr. Justice DOUGLAS, dissenting.

I think the claims which these Indians assert are claims "arising under or growing out of the treaty of July 30, 1863."

He who comes to my abode and bargains for free transit or a right of way across the land on which I live and which I proclaim to be my own certainly recognizes that I have a claim to it. That and more was done here. Routes of travel through this Shoshone country, the establishment of military agricultural settlements and military posts, the maintenance of ferries over the rivers, the erection of houses and settlements, the location, construction, and operation of a railroad, the maintenance of telegraph and overland stage lines were all negotiated. These provisions alone constitute plain recognition by the United States that it was dealing with people who had the power to grant these rights of travel and settlement. The United States, of course, did not need to follow that course. It could have invaded this Indian country and extinguished Indian title by the sword or by appropriation. *United States* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 347, and cases cited. But it did not choose that course. It chose to negotiate a treaty. And through the medium of the treaty it obtained from these Indians rights of way, rights to settle, rights of transit. It was stated in *Worcester* v. *Georgia*, 6 Pet. 515, 556, that "The acceptance of these cessions is an acknowledgement of the right of the Cherokees to make or with-

hold them." That is good law. It is as applicable here as it was in that early case. There, to be sure, lands had been specifically set apart for the Cherokees. But that is not a material difference. Indian title is the right to occupancy based on aboriginal possession. *United States* v. *Santa Fe Pac. R. Co., supra.* It has been the policy of the United States from the beginning to respect that right of occupancy. *Id.*, p. 345. As stated in *Mitchell* v. *United States,* 9 Pet. 711, 746, the Indian "right of occupancy is considered as sacred as the fee simple of the whites." Thus we may not say that because these Indians had only Indian title this case can be distinguished from *Worcester* v. *Georgia, supra.* When the United States obtained these cessions it acknowledged whatever claim to the land these Indians had. The Indians ask no more now.

Moreover, the Senate in ratifying the treaty made clear that it construed the treaty as recognizing the title or claim of these Indians to this land. The amendment added in the Senate provided: "Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof." That should put beyond dispute that the Senate understood the treaty to accord recognition of the title which these Indians had under Mexican law. To say it gives no recognition to any claim is to erase this provision from the treaty.

But if there is still any doubt as to the meaning of the treaty it should be wholly removed by another of its provisions. The treaty stated that "The country claimed by Pokatello for himself and his people is bounded on the west by Raft River and on the east by the Porteneuf Mountains."

That is now brushed aside as irrelevant. But we should remember that no counsel sat at the elbow of Pokatello when the treaty was drafted. It was written in a language foreign to him. He was not a conveyancer. He was not cognizant of distinctions in title. He neither had nor gave deeds to his land. There was no recording office. But he knew the land where he lived and for which he would fight. If the standards of the frontier are to govern, his assertion of ownership and its recognition by the United States could hardly have been plainer.

We should remember the admonition in *Jones* v. *Meehan*, 175 U. S. 1, 11, that in construing a treaty between the United States and an Indian tribe it must always be borne in mind "that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

When that standard is not observed, what these Indians did not lose to the railroads and to the land companies they lose in the fine web of legal niceties.

As stated by the Attorneys General of Idaho and Utah who appear here as *amici curiae*: "The result is that a peaceful and friendly people, lulled into a sense of security by the proffers of the United States of peace and amity, have been reduced from a nation able to wrest their living from their primitive ancestral home to a nondescript, homeless, and poverty-stricken aggregation of bands of Indians, without the means to compete in the modern civilization which had disseised them. Until the treaty with petitioners, petitioners were so strong and formidable that the trouble and expense of taking their lands by war—leaving out of account the dishonor that would have been involved in proceeding against a nation which had given no cause for war—would have far outweighed the expense of settling with them for their lands at whatever the cost in money. But the United States did neither. Congress felt it could not at that time afford to extinguish petitioners' title by purchase. Consequently, for a meager consideration, the petitioners granted respondent certain valuable rights in those lands. For respondent, under these circumstances, to attempt to deny petitioners' title is unworthy of

our country. The faith of this nation having been pledged in the treaties, the honor of the nation demands, and the jurisdictional act requires, that these long-unsettled grievances be settled by this court in simple justice to a downtrodden people."

The story has been told before. Chester Fee, Chief Joseph (1936); Howard Fast, The Last Frontier (1944).

Mr. Justice FRANKFURTER and Mr. Justice MURPHY join in this dissent.

Mr. Justice MURPHY, dissenting.

It is a well-settled rule that in the interpretation of Indian treaties all ambiguities are to be resolved in favor of the Indians. *Worcester* v. *Georgia*, 6 Pet. 515, 582; *Winters* v. *United States*, 207 U. S. 564, 576; *Carpenter* v. *Shaw*, 280 U. S. 363, 367. While this principle does not justify ignoring the plain meaning of words in order to prevent what appears to be an injustice to the Indians, it does mean that a court is bound to give to doubtful expressions that meaning least prejudicial to the interests of the Indians, giving full weight to the conditions under which the treaty was drawn. The application of this principle to the facts of this case makes manifest the error of the Court of Claims

The issue here centers about the meaning of the Box Elder Treaty of July 30, 1863, 13 Stat. 663, entered into between the United States and the Northwestern Bands of Shoshone Indians. Did the United States by that treaty acknowledge or recognize the claim of the Indians to the land in question so as to make it a claim "arising under or growing out of" the treaty for purposes of the jurisdictional act of February 28, 1929, 45 Stat. 1407? An affirmative answer to this question is dictated by both the treaty provisions and the circumstances surrounding the making of the treaty.

1. *Events preceding the Box Elder Treaty.* The great westward surge of the white men from 1849 to 1863 through the country claimed by the various Shoshone tribes aroused resentment and hostility among the Indians. Game was driven away and vegetation destroyed, forcing the Indians to steal or starve. Telegraph and overland daily mail lines were established through their territory in complete disregard of any rights they might have. The Government did little or nothing to supply the Indians with food or supplies during this period. White emigrants and the

Government were caused considerable trouble by depredations and warlike acts of these oppressed Indians. Some agreement whereby white emigrants could travel and the Government could maintain a communication system through the Shoshone area was imperative.

Little was done before 1861, when the Commissioner of Indian Affairs recommended that a treaty be negotiated with the Shoshone Indians which would grant them annuities "in consideration of a right-of-way across their country." In the same year the Superintendent of Indian Affairs for the Utah Territory also recommended the negotiation of a treaty, stating that the Shoshones "express their willingness to cede to the United States all the lands they claim in this Territory," with certain reservations.

In February, 1862, the Secretary of the Interior in a letter to the chairman of the House Committee on Indian Affairs acknowledged that the lands were "owned by the Indians" but reported that little was fit for cultivation and would probably not be "required for settlement for many years." He thus did not recommend the purchase of the land. In light of this letter, the House Committee on Indian Affairs recommended to Congress that it authorize the negotiation of a treaty for passageways over the land claimed by the Snoshones and not try to purchase the land.

Accordingly on July 5, 1862, Congress authorized the appointment of a treaty commission to negotiate such a treaty. 12 Stat. 512, 529. On July 22 the Commissioner of Indian Affairs instructed the treaty commissioners who had been appointed that the Government did not have sufficient knowledge to state definitely the boundaries of the country inhabited and claimed by the Shoshones but that it was understood that they inhabited "the country in the northern part of Utah and eastern portion of Washington Territories, through which lies the route of the overland mail, and the emigrant route through Utah and into Washington Territory and it is mainly to secure the safety of the travel along these routes that a treaty is desirable." He further told them that it was not expected that the treaty would be negotiated "with a view to the extinguishment of the Indian title to the land." They were told that the United States' assurances of amicable relations and the contemplated payment of $20,000 in annuities should enable them to procure from the Indians an agreement

for the security of the overland mail and emigrant routes, in addition to a "definite acknowledgment as well of the boundaries of the entire country they claim, as of the limits within which they will confine themselves."

Thus prior to the actual negotiation of the treaty, the United States recognized that the Shoshone tribes claimed and inhabited certain territory, the exact boundaries of which were uncertain. The fact that the United States thought it necessary to make a treaty concerning rights of way and the fact that the United States expressly did not desire to negotiate "with a view to the extinguishment of the Indian title to the land" strongly indicate that the United States considered the Indians as the owners of this ill-defined area of land. The securing of rights of way, which was the main purpose of the treaty, would have been a needless formality had title to the underlying land been thought to be in the name of the United States. And the securing of an acknowledgment of the boundaries of the land claimed by the Shoshones, which was a subsidiary purpose of the treaty, would likewise have been unnecessary if the United States considered itself the owner of all the land. The stage was thus set for a delineation of the Shoshone land to which the United States was prepared to acknowledge Indian title.

2. *The negotiations for and the contents of the Box Elder Treaty.* The treaty commissioners found it impossible to assemble all the Shoshone tribes at one time. They thus negotiated five separate treaties with the five Shoshone Nations. They met first with the Eastern Shoshones at Ft. Bridger, Wyoming, where they negotiated the treaty of July 2, 1863, 18 Stat. 685. This treaty pledged peace between the United States and the Indians and pledged the United States to pay annual annuities. The Shoshones in turn agreed that routes of travel through "Shoshonee country" should remain forever free and safe for the use of the United States and its emigrants and travellers. They also agreed that the United States might establish military agricultural establishments and military posts along said routes, maintain ferries over rivers, erect houses and settlements wherever necessary for the comfort of the travellers, operate and maintain existing telegraph and overland stage coach lines, and operate a transcontinental railway "through any portion of the country claimed by" the Shoshones. The treaty further set forth a description of "the Shoshonee country, as defined and described by said nation,"

leaving the western boundary undefined since there were no Shoshones present from that area.

On July 30, 1863, the commissioners met with the Northwestern Bands of Shoshone Indians at Box Elder, Utah. The resulting treaty also stipulated for peace and friendship and then incorporated by reference all the pertinent provisions of the Ft. Bridger treaty. The Northwestern Bands thus granted the same rights of way and easements over their lands as the Eastern Bands had granted. The Box Elder Treaty did not purport to describe all the land of the Northwestern Bands, but only the "country claimed by Pokatello [one of their chiefs] for himself and his people." This area was described as being bounded on the west by the Raft River and on the east by the Porteneuf Mountains.

Similar treaties were entered into with the Western Shoshones on October 1, 1863, the Shoshonee-Goship Bands on October 12, 1863, and the Mixed Bands of Shoshone and Bannock Indians on October 14, 1863. All these treaties were substantially the same insofar as the granting of rights of way and easements were concerned. And each of them set forth "the boundaries of the country claimed and occupied by said bands."

Thus by these five treaties the United States secured (a) freedom of travel and communication through the Shoshone country and (b) definite acknowledgment of the areas claimed by the Shoshones. While the Box Elder Treaty did not define the boundaries of the Northwestern Shoshone lands completely, reference to and collocation of the territorial descriptions in the other four treaties, as well reference to the map prepared at the time by the chairman of the treaty commission, supply the territorial boundaries of these lands.

The very acceptance in the Box Elder Treaty of these rights of way and easements constituted a recognition and acknowledgment by the United States that the Northwestern Bands had title to the land claimed. *Worcester* v. *Georgia*, 6 Pet. 515, 556; *Fort Berthold Indians* v. *United States*, 71 C. Cls. 308, 332. Such recognition and acknowledgment need not be indicated by any particular word or phrase. They may be implied as well as expressed. That is the case here. The Box Elder Treaty and the four other treaties would have been meaningless had the United States not thereby recognized the Indian title to the land claimed. Without such title, the Indians would have lacked power to bargain concerning the right

to travel and communicate over the land. Recognition of this power to bargain and acceptance of the fruits of that bargaining implied recognition of the underlying Indian title to the land. Otherwise there would have been no reason for the United States bothering to negotiate. Unilateral assertion of rights would have been resorted to had the United States not recognized Indian title to these lands. This is true whether the Indians held title based on aboriginal possession or whether they held lands specifically set aside for them. It is likewise immaterial that the main purpose of the treaties was to secure rights in the land rather than to acknowledge or secure title. The securing of those rights necessarily presupposes Indian title and necessarily recognizes such title.

Thus by its action in negotiating for and securing rights of passage and communication, the United States indicated its recognition and acknowledgment of Indian title to the land. The descriptions of the lands claimed by the various tribes were inserted merely to give the United States knowledge of the precise boundaries to the land held by the Indians. The fact that these treaties and the Box Elder Treaty in particular speak in terms of land "claimed" by the Indians does not negate recognition of title to the land so claimed. In the context of these treaties and in light of the ignorance of the Indians of legal niceties, the term "claim" need not be taken to mean bare assertion to title. It must be remembered that these Indians held title by aboriginal possession and that the United States was in no position to bargain as to the scope of the land so held. A bona fide Indian claim of this type is synonymous with ownership unless it conflicts with some other ownership or unless such an Indian title is unrecognized in law. Here, however, the United States did recognize this type of ownership and was anxious merely to ascertain the scope of the land so claimed or owned. The placing of these descriptions in a bilateral treaty is at least consistent with the conclusion that the United States recognized title to the extent of the lands claimed. And under the rule that ambiguities are to be resolved in favor of the Indians, we must adopt that conclusion.

3. *Events subsequent to the Box Elder Treaty.* Any doubt as to whether the United States by these treaties recognized and acknowledged Indian title to the land claimed is removed by actions and statements of the Government subsequent to the making of these treaties.

The Senate ratified each of the treaties. To four of them, including the Box Elder Treaty, the Senate added an amendment providing that nothing in the treaty should be construed to admit "any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof." See 13 Stat. 664. Whatever may have been the complexities of the Mexican cession title situation as described in the opinion of this Court, the Senate by this amendment clearly indicated that it understood each treaty to constitute a recognition of Indian title to the land claimed, at least as to lands outside the Mexican cession. Had the Senate been under the impression that no title rights were involved in the treaties it would have been meaningless to add this amendment. Resolving any doubts on this score in favor of the Indians compels us to interpret this amendment as another recognition of Indian title.

In 1863 the Commissioner of Indian Affairs recommended that further treaties with the Shoshones be negotiated to extinguish their title to the soil. And Congress in 1865 authorized the President to enter into treaties with Indians in the Utah Territory for the surrender to the United States of their possessory right to all agricultural and mineral land and for their segregation on reservations. 13 Stat. 432. Accordingly a treaty was made with the Eastern Shoshones in 1868 whereby they gave up the territory claimed by them in the Ft. Bridger Treaty in exchange for other lands. 15 Stat. 673. Here again is clear proof that the United States considered title to the land to belong to the Indians, making even more compelling the conclusion that the 1863 treaties constituted a necessary recognition of that title.

And as late as 1934 the Secretary of the Interior admitted that the territory of the Shoshones "was recognized by the United States as belonging to the various bands of Shoshone Indians" by the 1863 treaties and that the "Government recognized all the land as belonging to the Northwestern bands of Shoshones." Such statements are more than justified by the history and contents of the treaties.

One final matter remains. It is said that any money recovered by the Indians in this suit would have to be deposited in the Treasury of the United States, subject to appropriation by Con-

gress for their benefit, and that the only possible cash payment involves attorney fees. That may be true. But it does not justify ignoring the rights of the Shoshone Indians recognized under solemn treaties entered into with the United States. It does not command us to overthrow the moral obligation of the United States to fulfill its treaty obligations. And it does not warrant the application of narrow principles of construction to the injury of the Indians' interests. If Congress desires to place in the Treasury any money that might be recovered by the Indians in this suit that is the business of Congress, not ours. Our function here is at an end when we have determined if the Northwestern Bands have any claim "arising under or growing out of" the Box Elder Treaty. Because I believe they have such a claim I would reverse the judgment below.

Mr. Justice FRANKFURTER and Mr. Justice DOUGLAS concur in this opinion.